

Quarto & folio
Vol 2
LAW TRACTS,

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IN TWO VOLUMES,

BY

WILLIAM BLACKSTONE, ESQ.

VOL. I.

OXFORD,

AT THE CLARENDON PRESS.

M. DCC. LXII.

2 TO A ST WALL

DEFINITION OF THE VI



THE tracts now reprinted in these volumes were originally published separate, at different times, and upon various occasions. But, having been some time out of print, the author hath at length consented to his bookseller's request of collecting them together, and publishing them (with a few corrections and additions) in the present form. He hopes that the same candor will continue to attend them thus united, which (when single) they formerly experienced.

CONTENTS OF THE FIRST VOLUME.

- I. AN ESSAY ON COLLATERAL CONSANGUINITY.**
- II. CONSIDERATIONS ON COPYHOLDERS.**
- III. THE LAW OF DESCENTS.**

A N
E S S A Y
O N

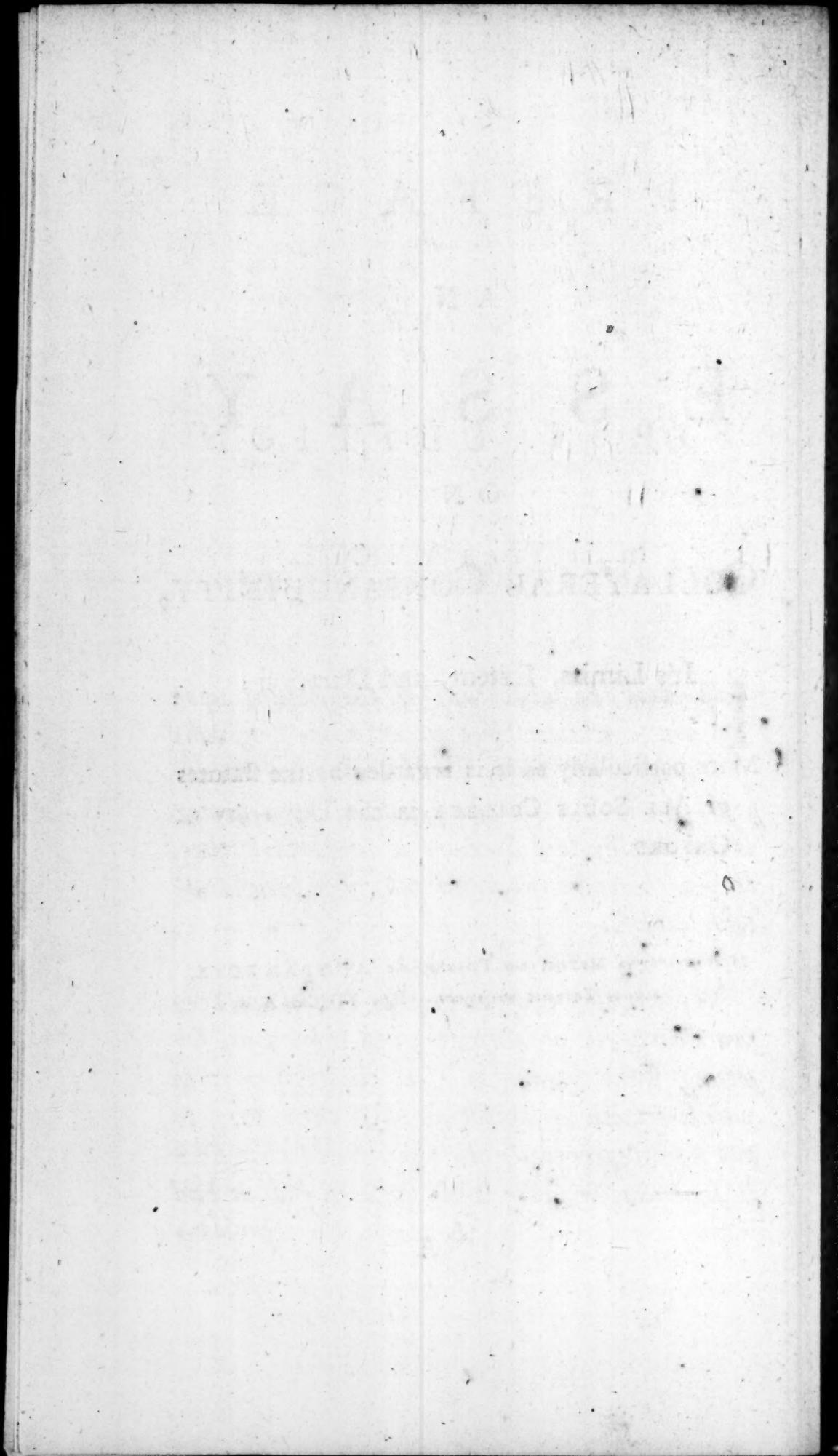
COLLATERAL CONSANGUINITY,

It's Limits, Extent, and Duration;

More particularly as it is regarded by the statutes
of ALL SOULS COLLEGE in the University of
OXFORD.

Μηδὲ προσέχειν Μυθοῖς, καὶ Γενεαλογίαις ἈΠΕΡΑΝΤΟΙΣ,
κατινετές Συντοτις παρεχόντοις. Πρὸς ΤΙΜΟΘ. Α. α. δ.

A



P R E F A C E
TO THE
FIRST EDITION

In the YEAR M. DCC. L.

IT was the misfortune of the society, upon whose account these papers were originally drawn up, that, about seven and twenty years since, a claim was revived upon them; which having lain dormant a considerable time, they with reason concluded was then become utterly extinct.

WHEN they came to consider this claim, they saw clearly the absolute necessity there was, for setting some bounds to that consanguinity, to which (while it lasted) it was their duty to pay a proper regard: they imagined, that since it some time or other must have an end, it had

probably expired in the space of three centuries; and, as they were informed that collateral kindred was seldom, if ever, extended beyond ten degrees at the utmost, they supposed that this was the farthest period, to which either law or reason would permit them to extend it in the present instance.

THEY farther considered, that this was by no means a matter of indifference; that if they were not bound by their statutes to admit the claimant, the nature of his claim and the privileges he insisted on were such, that they were absolutely bound to oppose him; and that they were no more at liberty to accept of a pretended, than they were to refuse a genuine, founder's kinsman.

UPON the maturest deliberation therefore, they ventured to reject the claimant, whose alliance to their founder (if any) was in a remoter degree than the tenth. They ventured to reject him, though a vigorous opposition was naturally to be expected from the weight of his family and friends; and though by the same resolution they consequentially excluded the descendants of that very person, who was afterwards to sit in judgment on their conduct.

UPON

UPON principles of the same kind their successors have ever since acted; thoroughly convinced (and that not lightly, but on grounds they have never heard answered) that all collateral consanguinity must some where or other have a limit; and industrious to the utmost of their power to discover, what limit was intended by their founder in this particular case.

BUT as human reason is ever fallible and imperfect, as well in societies as in private men, the success hath not at any time answered their endeavours. It was determined, in the first instance, that they had erred in rejecting the then claimant. And their successors have, by some fatality, fallen into as great errors, whenever they have endeavoured to set a limit to this claim: it having been constantly determined, that the different boundaries, which they have tried to establish at different times, have not been the proper ones; though what the proper boundaries are, hath yet been never adjudged^a.

^a The college have at several times (since the first publication of this essay) applied to their visitors for a decisive interpretation of the statute in respect to the duration of kindred; determined to acquiesce in that superior judgment to which

the will of the founder hath referred them. But this interpretation hath been constantly refused, and the question adjourned till it should come before the visitor in a judicial manner. But when afterwards an appeal hath brought it before that tribunal, in a method

IN the mean time, it has given them no small concern, that many gentlemen of sense and judgment, but unacquainted with the real state of the case, have mis-interpreted the frequent disappointments which the college have hitherto met with; and been ready to conclude from thence, that there must have been something very weak (if not worse) in their conduct upon this occasion. Unfortunate they have certainly been, (that, among the variety of boundaries they have tried, they should never be able to hit upon the right) but not blind, it is hoped, to the force of truth, nor perversely obstinate in a known error; since the main point which they have all along asserted, the necessity of some boundary, has never been decided against them;

method the most solemn and expensive that can well be devised, the most reverend judge hath uniformly contented himself with pronouncing, in general, in favour of the appeal then depending; without giving any reason for such his opinion, or laying down any principle whatsoever which might guide the society in the conduct of future elections.

Having mentioned this rule of practice in the exercise of visitatorial power, I cannot but subjoin to it another very singular usage respecting the proof of consanguinity. It matters not (it seems) what evidence of the pedigree was offered to the college at the time of their election below. If the appellant is so fortunate as, by

subsequent proof, to make it out to the visitor's satisfaction, the society by having rejected this latent kinsman are adjudged to have broken their statutes, and the oaths which they took to observe them; they totally forfeit their right of election; and therefore not only the appellant is inflated in the fellowship which he claims, but every other fellowship filled up at the same election is declared to be void and devolved to the nomination of the visitor; and, to crown all, some visitors have proceeded to condemn the college in costs, for not crediting evidence which they never saw, and for rejecting a pedigree which never appeared to be authentic,

P R E F A C E.

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or, if decided at all, has rather been decided in their favour. Yet hence unworthy notions have been propagated; disingenuous aspersions have been publickly thrown out, and printed invectives been privately dispersed, tending greatly to reflect on a society, which has always been solicitous to maintain it's reputation, though not at the expence of it's duty.

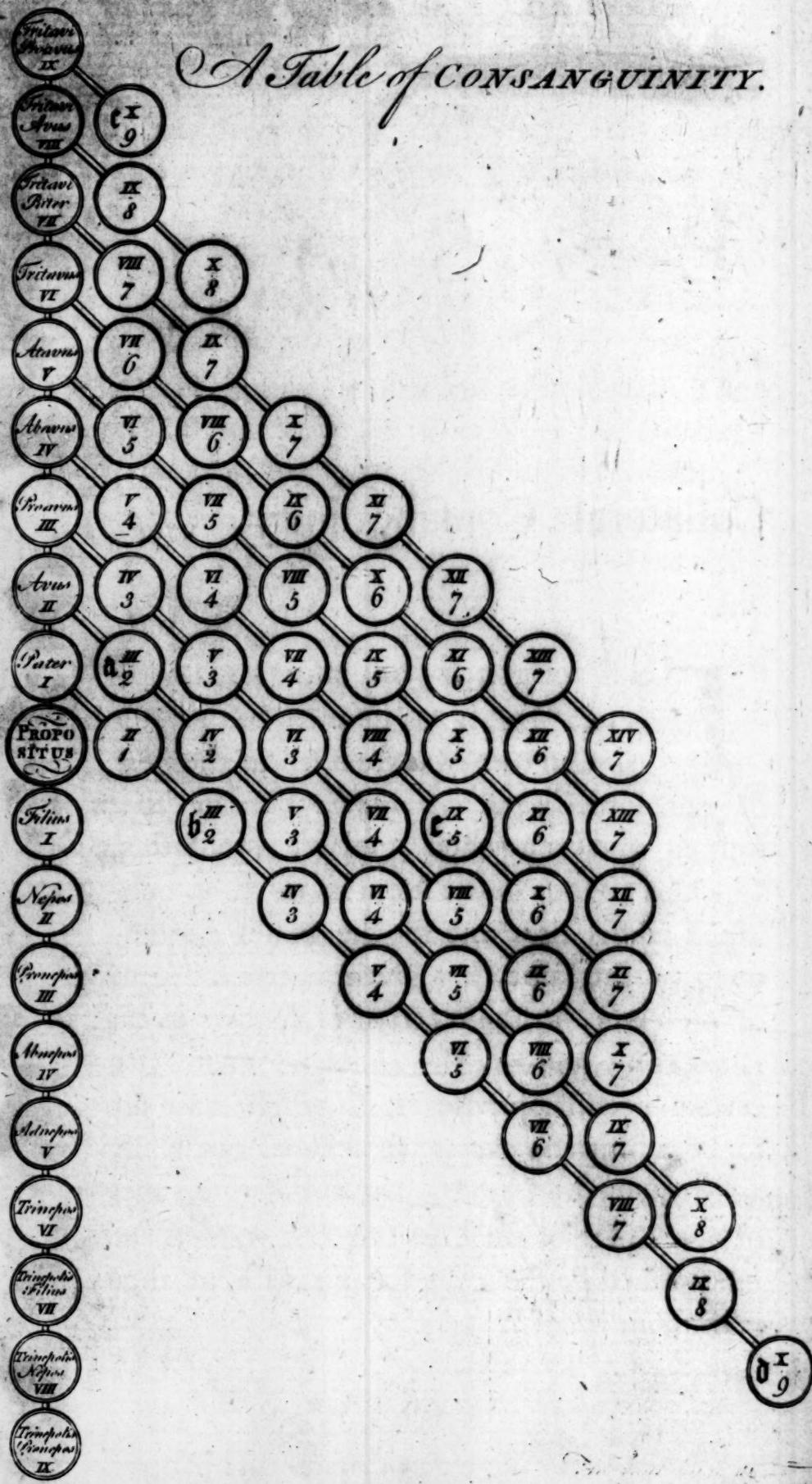
UPON these accounts it is, that the author of the following papers has been induced to consent to their publication; in order to demonstrate to the unprejudiced, that the behaviour of the college in this affair has been far from deserving reproach: since he hopes that, upon a fair examination, it will appear to men of candour and understanding, (for ignorance, which is ever obstinate, he undertakes not to convince) that the notions of the society are neither absurd nor unwarranted; that the general doctrine they insist on is clear beyond all contradiction; and that even in those particular cases, wherein it has been determined they have erred, they have at least erred upon plausible grounds, have been misguided by authorities too great for them to dispute, and been mistaken upon reasons too cogent for them to answer.

THE

THE principal, if not the only, arguments which are urged in support of the infinitude of kindred, are considered in the course of this essay. Other than these the writer does not recollect to have heard; unless indeed a round assertion, "That no limits have ever been set "to consanguinity in any law whatsoever." The truth of this assertion, as well as the force of those arguments, must be left to the opinion of the reader, after his perusal of these papers; which are wholly calculated to shew, that the college may still be right as to that part of the question, which has yet received no final decision from authority. To this end they are submitted, with all due deference, to competent and impartial judgments; there remaining only to add that (as they come entirely from a private hand) the society, whose conduct they propose to vindicate, is by no means answerable for any mistakes which may have arisen, through the uncommonness of the subject, or the inexperience of the compiler.

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A Table of CONSANGUINITY.



A N
E S S A Y
O N

Collateral Consanguinity, &c.

THE COLLEGE OR THE SOULS OF ALL FAITHFUL PEOPLE DECEASED OF OXFORD was founded in the year of our lord 1438, 16 Henr. VI. by that learned and renowned prelate, archbishop Chichele; who, in the statutes which he published in his life-time for the better government of the same, has given a certain degree of preference in the election of fellows to his KINSMEN; and has also indulged them with certain peculiar privileges, to which none are to be admitted, except those who are really and truly of his blood: and to the observance of every part of these statutes the warden and fellows are bound by a solemn oath at their admission.

I T

IT is therefore to them a matter of very serious concern to know, what persons are, or are not, comprehended under so general a name as that of kindred: for, as on the one hand they are bound *positively*, to pay respect to the blood of their founder wherever they meet with it; so on the other hand they are bound *negatively*, not to impart the advantages of kinsmen to strangers. Therefore it shall be the business of the ensuing pages to enquire, WHO THESE KINSMEN ARE; or, how far that relation extends, which entitles the persons related to the privileges of kinsmen.

THE rule, which must govern this enquiry, is undoubtedly the statute of the founder; and, if that be at all dubious, or applicable to more senses than one, the genuine meaning must be discovered by the ordinary rules of interpretation. Now these will be much the same, whether we are to consider the FOUNDER's statutes as his will, according to the doctrine of some; or as a body of laws for the government and direction of the society he had instituted, which seems to be the better opinion. For, though all laws interpret bequests and legacies in the most beneficial manner for the persons intended to receive them,

them, yet, in order to find out *who* the persons intended are, a less liberal construction is used; and of course the same rules of interpretation must prevail, whether we look upon the founder in a testamentary, or a legislative capacity.

THERE are two lights, in which the founder may be thought to have considered this relation of kindred; either as subsisting and extended *in infinitum*, or as bounded at some certain period and degree. In the following tract it will be attempted to shew, that he must be supposed to have considered it as limited and circumscribed within some particular boundary; and what that boundary was, may also be, incidentally, the subject of this enquiry.

IN order to proceed with the greater regularity and certainty, we will govern our interpretation by the rules, which have been laid down by writers of eminence and indisputable authority, and who cannot be suspected of any bias or partiality to either side of the question. Such are Suarez and Puffendorf; who have reduced^a all the methods of interpreting laws

^a Suarez *de legibus*, lib. 6. cap. 1. Puffendorf *de offic. hom.* lib. 1. c. 17.

to three, by considering, first, the very words of the law itself, “*verba legis;*” secondly, the occasion of making it, “*ratio legis;*” and thirdly, the intention of the maker, or “*mens legislatoris.*” And hence it is manifest, that the heads of our enquiry must be these, whether from the *letter* of the statute, the *occasion* of making it, or the probable *intentions* of the founder, it appears, that the kindred by him spoken of may continue to subsist *in infinitum.*

I.

IT will therefore be first necessary to ascertain the words of the statute, and then to consider their force. Now the name, which most usually occurs for the persons intended by the founder, is that of *consanguinei*^b: he also describes them^c in this manner, “*illi qui sunt, vel erunt, de consanguinitate nostra et genere;*” and again^d, “*hi qui de nostro sanguine fuerint.*” So that the words, upon which the present question arises, are these three, *consanguinitas, genus, and sanguis.*

^b Statut. de totali numero, &c. prope fin. —— de modo et forma et tempore eligendi, &c. prope fin. —— de communione annua vestium, &c. ad init.

^c Statut. de modo et forma, &c. prope init.

^d ibid.

THE strict signification of *consanguinitas*, by the civil law, is only that relation which subsists between brethren born of the same father^e; more distant kinsmen being comprised under the terms *agnatio* and *cognatio*. But this sense of the word being apparently too confined, we must take it, in the more enlarged sense of the canon and our municipal laws, to signify all collateral relations; and what they are shall be presently ascertained. *Genus*, in its proper signification, comprehends only a man's lineage, or direct descendants; “*genus est unicujusque generationis principium, ut avus est principium multis procreatis.*” But here also we must extend the word beyond the proper sense of it, if we would make it carry any meaning at all. *Sanguis* signifies^f properly “*cognatio naturalis,*” and is by much the most extensive word made use of, it importing the same that *consanguinitas* does in the canon and common law.

ALLOWING therefore every one of these words to be used in the largest sense it is capable of, the persons, intended by the foun-

^e *Ff. 38. 16. 1 & 2. Calvin. lex. voc. consanguinei et consanguinitas.*

^f *Calvin. lex. voc. genus.*
^g *Ibid. voc. sanguis.*

der to enjoy the privileges he appoints, will be his COLLATERAL RELATIONS ; that is, such as are the lineal descendants from some one of his lineal ancestors ; according to that usual definition of the canonists, *consanguinitas est vinculum personarum ab eodem stipite descendientium.* A definition, which in the course of this argument we shall frequently have occasion to refer to ; and which therefore should be thoroughly considered, in order to retain an adequate idea of what consanguinity is, in the sense wherein the founder uses it, and wherein it will constantly be used in the remainder of this essay.

LET us next observe the force of the term, *consanguinitas*, in this it's most comprehensive sense, and see whether or no the relation which it implies is necessarily without end, and without boundary.

THERE are two ways of considering the force of any expression ; either according to it's natural, or civil, propriety^h ; either in it's popular, or technical, significationⁱ. If then, in the first place, we consider consanguinity as a popular expression, (which, according to Puffendorf^k, is to be understood “ *in famoso*

^h Suarez ubi supr.

^k Ibid. §. 2.

ⁱ Puffend. ubi supr. §. 2. & 3.

“ signi-

“*significatu, quem illi imposuit non tam proprietas, quam popularis usus*”) the common notions of mankind will never teach us to look upon collateral kindred as a thing subsisting for ever. On the contrary, the affection, the remembrance, the very name of couins ceases after a few descents: even the several families, that have of late insisted on a relation to the founder, will hardly in common discourse acknowledge such a relation between themselves; though they have generally a much nearer *communis stipes*: nay, the very name of *cater*, or (as it is more properly wrote) *quater* cousins, is grown into a proverb; to express, by way of irony, the last and most trivial degree of intimacy and regard. When we speak of *our relations*, we only mean such as are within a few degrees of us; nor do we pretend to argue, that because all our kinsmen are descended from one common ancestor, therefore all who are descended from one common ancestor are to be reputed our kinsmen.

BUT if consanguinity is not here to be considered as a popular expression, but rather as a legal term; Puffendorf will farther¹ inform us, that “*vocabula artium explicanda*

¹ *Ibid. §. 3.*

B

“*sunt*

“*sunt secundum definitiones prudentum.*” The opinions of the lawyers are therefore to be consulted; and I trust that in the course of this essay it will clearly appear, that no law whatsoever has extended consanguinity *in infinitum*, when it considers it in the same light wherein it stands in the founder’s statutes.

TAKING this then at present to be the case; if in common speech the consanguinity here mentioned be never considered as diffusing itself infinitely, if in its legal acceptation it should appear never to be extended without limit, we need go no farther to find out the meaning of a statute, which those whom it most nearly concerns are sworn^m to interpret “*secundum planum, literalem, et grammaticalem sensum.*” But lest the favourers of this interpretation should seem to stick to the letter, through a fear that a farther examination should make against them, let us proceed to put it to the test, according to the two remaining methods of ascertaining the meaning of any law: and, first, the occasion of it.

^m *Juramentum officii custodis et sociorum.*

Now

II.

Now the occasion of the founder's making this particular statute was, undoubtedly, his affection and regard for his *real* kindred : and these motives we must suppose to be greater or less, in proportion to the nearness to, or distance from him. If therefore we enlarge the circle of his consanguinity, nay, set no bounds to it's circumference, the advantages intended his *real* kinsmen will dwindle into nothing at all. For, the fewer there are that are capable of partaking of a privilege, the privilege is undoubtedly the greater to those few that do partake of it ; an exclusive right to a fellowship is certainly an advantage, if confined within a stated degree of distance ; but if the limit be thrown down, and a door opened to every, even the remotest, degree, the privilege lessens in proportion as the numbers that enjoy it encrease.

W H A T then becomes of the founder's affection to his *near* relations ? Did he mean them a benefit, and, at the same time, by extending it to render it of none effect ? Did he mean to prefer his *distant* relations (if indeed they are intitled to that name) to such as are confessedly his *near* ones ? This even

the remote retainers to his family, who call themselves now-a-days his kinsmen, will not pretend. And yet this preposterous preference is the consequence of an infinite, nay even of a remotely finite, extension of consanguinity : the greater distance they are from him, the more likely will they be, on account of their superior numbers, to monopolize his bounty, and exclude his real relations (if any such there are) from partaking a share of his benevolence. A strange kind of inverse proportion ! And yet this would have been liable to happen, even at the foundation of his college : his own nephews might then have been excluded by some herald-made cousin, in the twentieth or other more remote degree.

THIS *might* have been the consequence even though it were not true, that unbounded consanguinity must necessarily end in its universality. But that this is really the case shall be presently shewn, since some have affected to doubt it ; and then it must be owned, that the strange consequences above spoken of will, instead of probable, become unavoidable.

THUS we see that even the founder's affection to his kindred (paradoxical as some may think it) will limit this relation within some

some certain degree. Yet this was only a *private* inducement of his; an inducement for excepting some particular persons from the general laws he had established. Let us now go a step farther, and consider his more *public* and avowed motives, for making those laws whereof the present clause is a part, and for founding that society for whose use those laws were compiled: the glory of God, the good of mankind, and the encrease of religion and learning. And it is to be feared, that these ends will be but indifferently answered by the infinite extension of kindred.

I S P E A K not this, with a view to cast any personal reflections; the cause I have undertaken disdains them: there have been, are, and undoubtedly may be, gentlemen as well qualified for a fellowship in morals, disposition, and learning, *with* pedigrees as *without* them; but the misfortune is, that, according to the doctrine which has hitherto prevailed, they are not *obliged* to be very eminent in either. Excellence, it seems, is not required in them, whatever it may be in other candidates; but the weight of a pedigree is sufficient to overbalance superior merit. Now we know that emulation is the strongest incentive to desert; and where a check is manifestly

nifestly given to that, where comparative merit is entirely put out of the question, positive (it is to be feared, from the general degeneracy of mankind) cannot be of long continuance.

IT is upon this account only, that I presume to doubt, whether the great ends of the founder will be answered by the infinite duration of kindred: and no more than this a certain noble writer^a must be understood to mean, when he charges the exclusion of learned men from these societies, as the consequence of admitting the claim of founder's-kinsmen.

THIS then is the amount of allowing the infinitude of that claim; the destruction of the great ends for which the society was founded; and also the destruction of those particular ends for which the kindred are excepted from the general laws of the foundation. But from the contrary interpretation no such inconveniences will follow. A decent and reasonable regard will be paid to the founder's blood, so far as his affection may be supposed to reach, and no farther: there will be room sufficient to admit all such, as

^a Lord Clarendon. See, in his tracts, the dialogue of youth and old age.

are within a moderate degree of propinquity ; but this will not happen so frequently, as to destroy the consideration of comparative merit ; for when, from the encrease of kindred, this inconvenience begins a little to be felt, the relation itself will gradually fail, and of course the evil consequences will be no more.

THIS being the case, one would think it impossible to entertain so dishonourable an opinion of the founder, as to suppose him capable of a meaning which absolutely contradicts itself : this would indeed be *interpretatio viperina*, as the doctors call it where the comment destroys the text ; and surely there is no reason to depart from the letter of the Statute, in favour of such an interpretation.

III.

WE are next to consider the founder's intention, or what Suarez calls^o the *mens legislatoris* ; and on this our pseudo-kinsmen have laid a great stress, alleging (with no great compliment to their supposed relation) that this is to be observed, however unreasonable it may seem ; and that it is to be considered, not what the founder *might*, or *should* have meant, but what he *did* actually mean. Now

^o *Ubi supr.*

how

how we can better collect the founder's meaning, than from the words of his own laws, and the occasion of his making them, I confess I cannot see; but however I trust it will appear, from every other method of collecting it, that he did not, could not intend that his kinsmen should extend their claim *in infinitum*.

I. ONE of the best and most general rules, for finding out the intention of a person who uses a dubious expression, is this: that where one signification of the word induces an injustice or absurdity, another signification is to be taken. And this is the rule, even where the unjust or absurd signification is the primary and proper one; it will hold therefore much more strongly here, where the case is otherwise. And that the extending of consanguinity *in infinitum* must necessarily produce very wild and absurd consequences, may be beyond contradiction demonstrated.

As all collateral consanguinity consists in being derived from one common parent, if this consanguinity knows no bounds, all mankind are without doubt kinsmen, because derived from the same original ancestor. This

is certainly a just consequence, how oddly soever it may sound; and the ridiculousness of it (if any) is not to be attributed to such as draw the conclusion, but to those who maintain the premises, from which this conclusion regularly follows.

LET us endeavour to illustrate this matter a little. The common stock of consanguinity⁹ of the founder and his nephew is the founder's father; the common stock of the founder and his cousin-german is the founder's grandfather; of him and his second cousin is his great-grandfather; and so on: all these are confessedly his kinsmen, and yet all derived from different common stocks. But unless there be some period to stop at, by the same rule that the common stock may be assumed three generations above either of the related parties, it may be assumed three hundred; we may ascend to Noah, or to Adam himself, and make him the *stipes* of universal consanguinity.

IF we consider it in another light, we may observe that all consanguinity is reciprocal; my nephew or cousin is as much related to me, as I am to him, and so *vice versa*. It

⁹ See the table of consanguinity prefixed.

will follow therefore that the founder's uncle^{*} or father's brother, **a**, is as much his kinsman as his nephew or brother's son, **b**; and the descendants of each of them are equally his relations: and in like manner the brother, **c**, of his eighth lineal ancestor (or eightieth, for it is all one) bears the same relation to him, as the lineal descendant, **d**, of his own brother at the same distance, and the descendants of each of them are equally his relations: for **a** and **c** bear just the same relation to the founder, as he himself bears to **b** and **d**. If therefore we may be allowed to *descend* infinitely, we must also by parity of reason be allowed to *ascend*; and, by ascending higher and higher, must at last reach our common parent; and, by adopting all that have sprung from his loins as founder's-kinsmen, take in the whole race of mankind.

Thus the infinite extension of consanguinity necessarily induces its universality, if we give credit to the Mosaic account of either the creation, or the deluge; of either the origin, or preservation of the human species. Nor will it be expected, that every man should prove his particular descent by evidences peculiar to his own family; since the whole includes all

* See the table of consanguinity prefixed.

it's parts, and (as the logicians speak) what is predicated of the species must be true of every individual. Such evidences may be necessary, where it is possible that the person, whom Titius asserts to be his and the founder's common ancestor, may not be so; but where it is impossible to be otherwise, as in the case of a descent from Noah, such proofs are idle and superfluous. In such a case one text of scripture ^{*} is of more avail than thousands of heralds' visitation-books. No college, I believe, will dispute that both Titius and the founder are descended from that patriarch, though every intermediate ancestor cannot be particularly named; unless perhaps the college of arms, which may look upon kindred as consisting not in the descent, but the deduction of it; not so much in the blood, as in the pedigree.

THE universality of kindred being once established, the absurd consequences of such a doctrine, in the present case, will flow in almost as fast as the kinsmen. A preference will be given by the founder, and no preference at the same time: particular exceptions will be made, (as with regard to persons born out of the province of Canterbury)

^{*} Genes. ix. 19.

and

and yet those exceptions exclude nobody; for kinsmen are eligible "*ubicunque fuerint ori- undi:*" a year of probation will be ordained, and no one to undergo it; for kinsmen are exempted from that trial; provisions will be made in case of their deficiency, and yet they can never fail, but at the end of the world.

SUCH are a few of the consequences of the infinite extension of consanguinity, and it's inseparable companion, the universality of it. Is it possible therefore to suppose, that a person, so illustrious for his wisdom and learning as the founder is acknowledg'd to have been, could ever think of, or intend such an extension; in contradiction not only to reason, and to himself, but (as will be next shewn) to the general sense of his contemporaries, and the maxims of the civil, the canon, and the common law? For,

II. A SECOND rule for determining the dubious sense of a legislator, is by comparison with other laws: if they are repugnant to one interpretation, and agree with the other, the latter is undoubtedly to be chosen. And, in order to bring the case before us within this rule, it will (as was before¹ pro-

¹ *Suar. ubi supr.*

² *pag. 18.*

mised)

mised) be attempted to shew, "that, whenever other laws have considered consanguinity in the same light in which it is considered by the founder's statutes, they have never extended it *in infinitum*." It will therefore be first necessary to state clearly, in what light the founder's statutes do consider it.

Now the object of the statutes is consanguinity *in general*, and not *proximity* of blood; the college is not concerned to enquire who is *next* of kin to the founder, but who is of kin *at all*; the most distant, as well as the nearest, relation has an equal right to the advantages there given. Before therefore it can be determined whether a man be a kinsman, it is necessary to know how far consanguinity extends. But this is not so necessarily the case, when proximity only is the object of our enquiry. There the question is whether A, or B, is the *nearest*, how distant soever they both may be; for the rule then is, that *remotus excludit remotiorem*. And this may be determined, without knowing precisely what are the farthest limits of consanguinity, or indeed without setting any bounds to it at all. If a question arises, whether Kent or Cornwall be the nearest to Oxford, we may easily decide it,

it, without defining exactly where the neighbourhood of Oxford ceases: but if the question is, whether Kent be in the neighbourhood of Oxford or not, this cannot be regularly decided, without pointing out precisely how far this vicinity extends.

ACCORDINGLY we shall find, that all laws, when consanguinity in general is the object of their contemplation, have avoided extending it *in infinitum*; and the express boundary is declared by most of them: but when proximity only comes to be considered, such a boundary being then a matter of indifference, it seems to have been adopted by some legislators, and rejected by others. And that for this plain reason; that the same absurdities will not follow in the one case, as in the other: for, though it is clear that, if no limits be set to consanguinity, the whole race of mankind are of kin to Titius; yet it will not hold farther, that all mankind are his *next* of kin. So also *lineal* consanguinity is allowed by all laws to last *in infinitum*; because the infinite duration of that does not necessarily infer its universality, as has been shewn to be the case among *collaterals*.

IN order therefore to make good the position I have laid down, "that when consanguinity in general is considered by other laws, without regard to proximity, it is never extended *in infinitum*," I must beg leave to review the several lights in which other laws have considered it.

1. AND first, with regard to successions, or the disposal of inheritances, wherein the next of kin is usually preferred; this might, and indeed ought to be entirely laid out of the case, for the reasons above given, as being always a question of proximity. But this being the strongest hold of the gentlemen who favour the infinitude of kindred, and the common law seeming to give some colour to their notions in this point, it may be matter of curiosity to look a little into it; premising beforehand, that it has no relation at all to the present argument.

IT would lead us into a very large field of dispute, if we were to enquire into and weigh all the arguments on both sides upon the question, whether, by the civil law, successions among collaterals were pretended *in infinitum*.

finitum. The words of the law^w are, that they shall succeed “*et si decimo gradu sint:*” and the most cautious of the commentators have confined themselves to that, or the like expression; well knowing, that whether the limits of consanguinity were hereby defined, or whether it was only *numerus certus pro incerto*, is a question more of curiosity than use; since it can hardly ever happen that a man’s next heir should be at a remoter distance than ten degrees. But among those who have declared their minds more openly, we shall find, that the generality of the antient lawyers are for confining successions to the tenth degree, and many of the moderns for extending them without limit. The founder, in all probability, thought with the antients; that being the received opinion of his own age, and those more immediately before and after him; and lord Coke will inform^x us, that “*contemporanea expositio in lege est fortissima.*”

THAT this was the doctrine of the antients, is acknowledg'd by Van Leeuwen, who, being of a contrary opinion himself, calls^y it indeed the “*error,*” but yet the “*communis error,*” of the practisers before him;

^w *Infl.* III. 5. 5.

^x *Co. 4 Inst.* 138.

^y *Glos.* in *Infl.* III. 5. 5.

and

and may abundantly appear from the following express authorities, besides a multitude of others which might be brought to the same purpose.

Azo, who flourished before the founder, and speaking^a of the mistaken notions of some old canonists (who thought that the civilians reckoned as far as the fourteenth degree, because seven canonical^b degrees will sometimes make fourteen legal ones) proceeds thus;

*“ ultra decimum autem gradum nunquam pro-
cedimus; licet enim decretistae dicant nos com-
putare usque ad decimum quartum gradum,
quod falsum est tamen: imo, non computamus
ultra decimum, scilicet ad commoditatem; nec
ultra decimum aliquid mihi vendicare, jure
cognitionis, possum: computare tamen potes
mille, si velles; personas enumerando.”*

NICOLAUS de Ubaldis (who wrote about the year 1470, and may therefore be well enough reckoned the founder's cotemporary) in his^b treatise of successions says;

“ restat videre nunc usque ad quem gradum vo-

^a *Summ. in lib. 3. Infl. de grad. cog-
nat. §. 8.*

^a See the table of consanguinity.
^b *De success. ab intestat. p. 3. §. 12.*

"centur ad successionem. Dic quod, si loquimur
 "in linea descendenti vel ascendi, usque quo
 "vita hominum perduci potest vocantur: si de
 "transversali, tunc vocantur usque ad decimum
 "gradum." And afterwards^c, speaking of the
 cases wherein the inheritance would escheat to
 the fiscus, he is express, that "si defunctus
 reliquit unum ex transversalibus, forte ultra
 decimum gradum, certe fiscus succederet."

COVARRUVIAS, who flourished in 1530,
 has this^d passage; "quæ quidem (sc. consan-
 "guineorum) successio usque ad decimum gra-
 "dum tendit, nec ulterius progreditur."

PETRUS Loriotus, Salinensis, who wrote
 about the year 1541, among other rules
 for succession lays down^e the following;
 "postremo sciendum est, transversos, cujuscunque
 qualitatis fuerint, non ultra decimum gradum
 "vocari."

GAILL, who wrote his treatise in 1577,
 speaking^f of the succession in feudalibus, pre-
 mises; "agnatum de jure communi in bonis al-

^c De success. ab intestat. p. 5. §. 1.
^d De success. ab intest. §. 11.

^e Comm. in tit. de grad. affin. fol. 30.
^f Observ. 2. 150.

"lodialibus

"Iodialibus ultra decimum gradum non succedere,
"sed fiscum vocari, non ambigitur." And here-with agrees Craig, who only doubts^a whether the limit of cognation, with regard to the succession to inheritances, was the seventh, or tenth degree.

I AM unwilling to multiply quotations any farther; but the testimony of Lyndewode must by no means be omitted; whose authority, great as it is at all times, is much stronger in the present case than in any other; as he was the founder's more immediate contemporary, his chaplain and official, and according to general tradition the compiler, or at least reviser, of his statutes. And he, in his comment upon one of archbishop Stratford's constitutions^b, explaining "*qui dicuntur consanguinei*," refers back to a former note, which^c is as follows. "*In successione ab intestato prima causa est liberorum; secunda ascendentium, cum quibusdam collateralibus, si extent; tertia transversalium. Primae duae in infinitum protenduntur, tertia usque ad decimum gradum protenditur, sive sint agnati sive cognati. Iстis autem deficien-*

^a *Jus feud. lib. 2. tit. 15.*

quorundam. v. consanguinit.

^b *Prov. constit. lib. 3. tit. 13. c. ita*

^c *Ibid. v. decendentium.*

*"tibus, si extet uxor defuncti, ipsa succedit;
"post eam fiscus^k:*

So stands, or at least in the founder's days so was thought to stand, the civil law with regard to successions.

THE canon law, considered as such, has very little to do with inheritances; it only considers them incidentally, and in such cases always refers^l to the civil law. But it will be acknowledg'd by any one, the least conver-fant therein, that the canonists were of opinion that the civilians did not extend successions *in infinitum*. They seem indeed to have

^k For the better understanding what Lyndewode, and the authors before quoted, have here said, it may be proper to subjoin what the general rule of successions by the civil law was. In the first place the children or lineal descendants were preferred: if the deceased had none such, then the father, or mother, or lineal ascendants were called in, and with them the brethren or sisters of the whole blood to the intestate, and also the children of a deceased brother, but no farther: these are what Lyndewode means by "*qui-
busdam collateralibus, si extent.*" On failure of lineal ascendants, the nearest collaterals succeeded, even to the tenth degree: on their deficiency, the husband or wife came in: and, on the

total failure of all these, the public was then the heir, and the inheritance escheated to the exchequer. See *Nov. 118. c. 1, 2, & 3. Nov. 127. c. 1. Ff. 38. 1.* Nearly similar to which is the law of successions established by the present king of Prussia; who, under the head of collateral descents, has very emphatically expressed his sentiments of a remote alliance in blood: "There shall no longer after the tenth degree be the least regard paid to kindred, in respect to a succession ab intestato; but the inheritance shall be reputed vacant and fall to the king's exchequer." *Code Freder. p. 2. l. 6. tit. 5. §. 5.*

^l *Decretum, part. 2. cap. 35. qu. 1
& 3. c. 1 & 2.— & qu. 5. cap. 2. §. 1.*

many of them^m imagined, that as the seventh degree, according to their computation, was the boundary of consanguinity in the canon law, so it was also the *ne plus ultra* of successions in the civil. A mistake, which might naturally arise from that narrowness of thinking, which too often accompanies those persons who confine their studies to one branch of science only. However, it at least proves one thing, (which was before hinted at) that in the course of nature it hath never, or very rarely, happened, that kinsmen in very distant degrees have been called to the inheritance of an intestate; since if such instances were at all frequent, it could never be long a doubt whether the seventh canonical degree, or the tenth of the civilians, was the legal boundary of successions.

THE municipal laws of England, it must be frankly owned, set no boundaries to this succession: the land descends to the next heir, of the blood of the first purchaser, at any distance whatsoever. Yet, though the laws allow the next heir, however remote, to take the inheritance, even in this case they do not

^m Vide Azon. summ. in lib. 3. Infl. de tit. 15. (*supra-citat.*) Decretum. part. 2. grad. cognat. §. 8. Craig. *Jus feud.* lib. 2. caus. 35. qu. 5. cap. 2. (*infra-citat.*)

seem to extend consanguinity *in infinitum*; for the heir cannot claim the estate, *tanguam consanguineus*, beyond a particular degree.

FOR, by the old law, a man who could claim within that particular degree had the advantage of a peculiar writ, called a writ of *cofinage*, which a more remote heir was excluded from; since no one could have this writ, if his common ancestor (by a descent from whom he claimed to be heir to *J. S.*) was removed higher than the *tresfael* or great-grandfather's father; that is, unless the common ancestor was within four degrees of the claimant. This appears from Fitzherbert¹;

"en brefe de cofinage home poit count par re-
 "sort jesque al frere la besail et cest al 4 de-
 "gree;" and in another² place he says the same. Britton also³ confirms this rule; "car
 "tielx brefs tenent lieu entre prives du faunk,
 "clamauntz par une descente, amountaunt jes-
 "ques a tresfael, si le temps le soeffre." What may therefore be inferred from hence is, that if the reason why inheritances descend to a remote heir, is *not* on the score of consanguinity, it will not follow, that because inheritances descend *in infinitum*, consanguinity

¹ Grand abridgment. tit. *cofinage.*
pl. 15.

² Ibid. tit. *aiel.* pl. 6.
³ Cap. 89.

must endure for ever. On the contrary it will rather follow, that the law supposes no such perpetual duration; since, though a man may claim as heir at any distance, he is not suffered to call himself *cousin* and heir, but within the fourth degree.

INDEED at first sight it may justly seem matter of wonder, from whence this theoretical rule of our laws (for, morally speaking, it cannot go far in practice) had its original; since the Norman laws, to which ours bear so remarkable a conformity, that it has been much disputed⁹ which of them is derived from the other, are in this respect very different. Successions are not extended by them beyond the seventh degree. “*Scavoir debuons,*” says the grand Coustumier, *que le lignage sentent jusques au septiesme degré;*” and again; “*l’heritage doibt descendre a celuy, qui est le plus prochain en lignage a celuy qui le tint, apres sa mort, pourtant que il soit du lignage dedens le septieme degré de celuy dont l’heritage descend.*” The gloss indeed very properly confines this rule to the collateral line only: “*cest a entendre a la ligne collaterale,*

⁹ See Hale’s history of the common law.

¹ *Grand Coustumier de Normandie.*
sc. 25. de eschance.

“lateral, et non pas la ligne droite, car il n'y a point de fin.” But this difference between the two laws will be tolerably well accounted for, when we consider that both the Norman and the English laws of descent are plainly offsets from the feudal; in which at one time (as we learn¹ from Craig) successions extended only to the seventh degree, though afterwards they were allowed *in infinitum*.

HAVING mentioned the feudal law, it may farther be observed, that, according to the rules of that law², the *feudum novum*, or one newly purchased, could only descend to the children and lineal descendants of the purchaser. For, if he had no lineal descendants, it could not ascend to his father, or any of his lineal ancestors, as the law with us still is: nor could it go to any of his collateral relations, but would rather escheat to the lord: because whoever would succeed to a feud, must have entitled himself to the succession in a regular course of descent from the first feudatory or purchaser. “And this” (as the learned author³ referred to has observed) “was no doubt the ground of what the

¹ *Jus feud.* lib. 1. tit. 4. §. 9.

² See Wright's introduction to the *Jaw of tenures*, pag. 182 to 186; and

Craig, Stryke, Hanneton, and Zazius,
there cited.

³ *Ibid.* 183.

"lord Coke calls" that old and true maxime "in our law, that none shall inherit any lands as heir, but only the blood of the first purchaser." And hence it is certain that this maxim, when it was first adopted by our law, by *blood* meant lineal descendants only; for consanguinity in general it could never mean, because not only the collaterals, but all the lineal ancestors of the purchaser were excluded from inheriting.

WHAT therefore has been so much insisted on, the *infinite* hereditary right of succession, appears to have been originally *confined* to the descendants of the first purchaser, and that descent was necessary to be strictly proved. Afterwards indeed a more loose kind of evidence was admitted; "for it" becoming in "many cases impossible, by length of time "and a long course of descents, to deduce a "title from the *first* feudatory, proof of being "heir to the *last* was necessarily allowed, as "the best proof that could be expected of "title from the *first*." And this is what Mr. justice Wright calls^x substituting a *reasonable* in the stead of an *impossible* proof; for the person, who would now entitle himself to a fee

^w Co. Litt. 12 a.

^y Ibid. 185, 186.

^x Wright's Introd. 184, 185.

as heir by descent, is not obliged to offer any direct proof of his being of the blood of the first purchaser, but is only to prove himself heir of the whole blood to the person last seised; and when that is done, the law presumes the other. So that the *stipes*, from whom the heir is to deduce his pedigree, is not at present the first purchaser; but as often as a descent happens, so often is the *stipes* altered; for now *seisina facit stipitem*, which is, and we know has been, the maxim of the common law ever since Fleta's time², and perhaps was so long before it.

IF then we rightly observe the course of descents according to this law, we shall find that it is really not *collateral*, but *lineal* consanguinity, which is attended to *in infinitum*. For the intendment of the law is, that one of the lineal descendants of the first purchaser constantly succeeds to the inheritance; that is to say, that lineal descendant in particular, who is also the next heir of the person who was last seised. And there is no dispute, but that lineal consanguinity may reasonably enough be extended without end or boundary.

² Lib. 6. cap. 2. §. 2.

^a See pag. 30.

THOSE gentlemen therefore, who urge the common law rules of descent as an authority for the unlimited extension of the founder's kindred, would do well to consider how little analogy there is between the two cases, either in the thing to be proved, or the rules of proof. For, first; the object of the common law is (as hath been said) *proximity* merely: not indeed an *absolute* proximity, but a proximity *sub modo*; such a one as, consistently with the other regulations of the law, (*viz.*, the preference of males to females, of the elder branch to the younger, of the whole blood to the half, of the *agnati* to the *cognati*) is sufficient to mark out, not who is related in general, as in the case of founder's kinsmen, but who is the *next heir*. Secondly; in every question of descent at the common law, as the person entitled to succeed is only *one*, (for where many sisters inherit as coparceners, they all^b make but *one* heir) and that usually the next of kin, which prevents the confusion that would result from a variety of other titles; so is the person, from whom he is to derive his claim of being allied to the first purchaser, only *one*, and that the person last seised: whereas the claim of consanguinity

^b Littlet, *ten.* §. 241.

nity to the founder is open at once, not to *one* only, but to the *whole* race of kindred, to the most distant as well as the nearest relations; and their alliance is to be deduced, not from any *one* of his ancestors in particular, but from *all*, or *any*, of his remote progenitors. Lastly; the distance of time, from the founder's days, must have already occasioned to many families the same impossibility of direct proof, as was at the common law, when the heir was obliged to prove himself of the blood of the first purchaser. But no *reasonable* proof has, as yet, been thought expedient to be substituted, in lieu of the *impossible*; and when, or whether it will ever be so substituted, or what is such reasonable proof as might be admitted in this case, it is not my part to determine. I can only remark, that the common law rules of proof are as well entitled to our observance here, as the common law rules of descent; and if, in imitation of those, proof of being of kin to any person who was *formerly* admitted (or who was *last* admitted) to a fellowship as the founder's kinsman, should ever be allowed as proof of being of kin to the founder, such a method of proceeding would, I doubt not, very soon demonstrate the truth of the positions laid down in this treatise; for (without having resort

refort to our common parent) scarce a candidate would be found in the kingdom, who might not be thus *proved* to be some way or other related to the founder.

IT appears then, on the whole, that the case, wherein the common law seems to favour the infinitude of kindred, is by no means parallel with the present. I shall therefore next attempt to shew, that in parallel cases a limit is set to consanguinity by the common and all other laws, that were ever regarded in England; having digressed thus far out of the way, merely to follow those gentlemen who lay so much stress on a matter foreign to the present purpose.

2. ANOTHER, and a more apposite, light in which consanguinity has been considered by divers laws, is with regard to a custom, called among the Normans tenure by *parage*; and which was also engrafted into the laws of England, though the name seems never to have been adopted. Tenure by *parage* was where several persons, descended from the same ancestor, held equal portions of an inheritance; as for instance, an estate in coparcenary, which is shared among several sisters and their descendants: in this and the

like

like cases, the younger branches were not bound to do any service to the elder, by reason of the privity of their blood. Now here the object, which the law contemplates, is not proximity, but consanguinity in general; it is not the *nearest* relation only that is quit of services, but *all*: if therefore this consanguinity were never to have ceased, none of the descendants of the younger branches could ever have been bound to do service to the elder. But the law was otherwise: till the sixth degree the younger were excused from any service; but *at* that degree they were bound to do fealty, and *after* that homage, to the elder branch. So ^c the grand Coustumier; “*Teneure par parage est quand cil qui tient, et cil de qui il tient, doibuent par rai- son de lignage estre pers, es parties de l'heritagé qui descent de leurs ancesteurs. En ceste maniere tient le puisne de l'ainsne, jusques a ce q'l vienne au sixte degre du lignage. Mais dillec en avant sont tenus les puinez faire feaulte a l'ainsne. Et eu septieme degre, et dillec en avant, sera tenu par hommage ce qui devant estoit tenu par parage.*” And the reason, which the gloss gives for this distinction, is, that at the sixth degree they have one degree of kindred left, but at the seventh they

^c *Cb. 30. De teneure par parage.*

are

are “*bors de consanguinitate.*” In like manner as the text itself, in another place^a, declares the seventh degree to be entirely *bors du lignage*. “*Quand le lignage sera alle jusques au sixte degre, les boirs aux puisnez seront tenus a faire feaulte aux boirs de l’ aifne; et quand il sera alle jusques au septieme degre, ilz seront tenus a leur faire hommage: pour ce que le septieme degre est du tout hors du lignage.*”

THIS was also part of our common law, when these sort of tenures were in use; with this nominal difference, that with us the consanguinity ceased after the *third* degree; which, by the different ways of computation, might be much the same as the *sixth* among the Normans. Thus^c Glanvil; “*de omnibus terris non fieri debet homagium; quia non de dotibus, nec de maritagiis liberis, nec de feodo juniorum sororum de primogenita tenentium, infra tertium haeredem utrobique.*” And in another^e place; “*nullum autem homagium, vel etiam fidelitatem aliquam tenentur mariti post-natarum filiarum marito primogenitae filiae facere in vita sua, nec earum haeredes primi vel secundi; tertii vero haeredes, ex postnatis filiabus exeuntes, secundum jus hujus regni*

^a Cb. 35. *De aides chevalz.*

^c Lib. 9. cap. 2.

^f Lib. 7. cap. 3.

“*homagium*

"*bomagium tenentur facere de suo tenemento
baeredi filiae primogenitae, et rationabile
relevium.*"

3. SOMEWHAT similar to this is the case, where a person gives lands to his daughter or cousin, and her husband, to hold in frank-marriage; which gift discharges the donees and their issue from all rents and services to the donor and his issue, except fealty, till the fourth degree be past^g on both sides. So that in these instances, where proximity is not the thing attended to, the law has set a boundary to kindred.

4. A BOUNDARY has also been thought proper, by the antient law, to be established, with regard to the writ of right *de rationabili parte*; which lies always (according to ^h the register) between privies in blood, and not between strangers. It is properly then ⁱsuable, when two or more persons claim by descent from the same ancestor, (as in gavelkind or co-parcenary) and one of them enters upon, and occupies the whole: for in such case the parties deforced have their remedy by this writ. And since it lies only between privies

^g *Littlet. ten. §. 19.*

^h *fol. 3 b.*

ⁱ *Regist. ibid. Fitzh. n. b. 9.*

in blood, the parties are ^j excluded from waging battail, &c, the usual method of determining all controversies at the antient law. Now had the privity of blood been extended in this case *in infinitum*, had the common ancestor been allowed to be assumed at any degree of distance, this writ would have been open to all men; the connection of consanguinity would have been universal; there would be no strangers to be excluded from the writ; and every one would be intitled to exemption from the trial by battail. But the law has prudently interposed a boundary here, and determined ^k that this writ is not suable after the third degree be past; “*ne gift entre parents queux clamont par descent, apres que il passa le tierce degré:*” and of course that the exemption from the trial by battail shall extend no farther; the which, according to Fitzherbert^l, Finch^m, Brittonⁿ, and the Old Natura Brevium^o, “*ne se joindra pas entre parents, avaunt ceo que ils soient passés le tierce degré de parents, la ils count per un descendant.*”

^j Fitz. n. b. *ibid.* Vet. Nat. Br. 4 f.
79 e. Finch. *law.* b. 4. cb. 18.
Britton. cap. 73.

^k Vet. Nat. Br. 6 g. Finch. *ibid.*
Britton. cap. 79.

^l Gr. abridgm. tit. Droyt. pl. 31.
^m Ubi *supr.* & b. 1. cb. 3. max. 29.
ⁿ Ubi *supr.*

^o Ubi *supr.* & 79 f.

5. ANOTHER instance, in which our law has regarded consanguinity, is in the case of an appeal of death; which, when a man is killed, his heir male is entitled to bring (even after an acquittal on an indictment) if he believes the appellee to be really guilty. And though this be a case merely of proximity, yet even here the antient law, as we learn^p from the Myrroure, set a boundary to the kindred, *viz.* the fourth degree. “*Les ap-*
“peles de homicide fueront restraine, par le roy
“Henry le premiere, jesque al quatre prochein
“degress de sanck.” And in like manner the weregild, or pecuniary forfeiture for the death of a man, which obtained universally among all the northern nations, was distributed with a similiar restriction among the antient Goths: one half was given to the next of kin; a fourth to the next but one; and the remaining fourth was divided among the relations of the deceased, but only to the seventh degree^q.

UNDER this article, of appeals, may be mentioned an antient custom, which is said by the judges^r in the founder’s time, to have

^p Myrroure des Justices. cap. 2. §. 7. ^r Yearbook. Mich. 11 Henr. 4.

^q Stiernhook *de jure Sueonum & Go-* pl. 24.
iborum. l. 3. c. 4.

obtained

obtained in their days : that when a man was hanged on an appeal of death, the wife of the person killed, and *all* his kindred, “*tout “fank,”* drew the felon to execution. It will not, I imagine, be contended, that the kindred were admitted to *this office in infinitum.*

6. THERE is another light, in which the laws of England have considered consanguinity, which I should chuse to pass over, as I apprehend but little can be gathered from it ; but I would not be conscious of omitting any instance, in which I can recollect that kindred has been treated of in our laws. What I mean is with regard to the proof of villainage, when the lord brought his writ *de nativo habendo*, in order to recover the possession of him whom he claimed to be his villein. For in such case, if the defendant claimed him as his villein by descent, it was incumbent upon him to prove it by his kinsmen ; (“*per consanguineos de eodem stipite, unde ipse exierat, exeuntes,*” says * Glanvil ; which, by the way, conveys the true idea of consanguinity) that is, he was obliged to produce some of the defendant’s kinsmen, who

* Lib. 5. cap. 4.

Litt. 187 b. Old Tenur. 127. Old

^t Glanvil, *ibid.* Regist. 87 a. Co.

Nat. Brev. 30. Fitz. n. b. 78 b.

should confess in court, that they were villeins to the demandant. Now here it must be owned that the precise degree, where this consanguinity ended, is no where (that I know of) set down in the books; but, on the other hand, I do not find any where asserted that it was extended with boundary; which is, in strictness, sufficient for my purpose, as the position I have advanced is merely negative. Though from the whole of what Glanvil says upon this occasion, I think it might fairly be inferred, that there were some positive limits set to the kindred in this case; notwithstanding, at this distance of time, we are at a loss to know what those limits exactly were: but I am rather desirous to establish the truth, which I contend for, upon clear and undeniable evidence, than upon such as is in any shape liable to cavil and exceptions.

Note indeed that it is of much importance, whether it were infinitely extended, or no; for, if some of his relations appeared to be bond men, and others of them free, it was then^u to be enquired by a jury, whether the bond or free men were his *next* of kin; and according to the state of his *nearest* kinsmen, his own liberty was to be determined. Since

^u Glanvil. *ibid.*

there-

therefore, in case of a multiplicity of kindred, which will always follow from admitting distant ones, the point was here reduced to a question of mere proximity, it signifies nothing to our present purpose (as has been more than once observed) whether they were, or were not, admitted without any boundary.

7. LET us therefore proceed to another method, and that a very universal one, of considering kindred; I mean, with regard to the prohibitions of marriage. With us at present, by the statute^w of Henry the eighth, these prohibitions extend no farther than the Levitical degrees; (the utmost of which is the third^x, according to the civil computation) but in the founder's time they were regulated throughout all christendom by the canon law. And it is in that law that consanguinity has been treated of most at large, and with the greatest accuracy; other laws only regarding it incidentally, and generally with a reference to the canon. As therefore the kindred, which is the object of the canon law, is of the same nature with that which is the object of the college-statutes, (the question in both being, who are kinsmen, not who is the next kin-

^w 32 Henr. 8. cap. 38.

^x *Trin. 8 Geo. 1. Rep. of cases in equ.*

* See the case of *Butler v. Gastrell*, 158.

man) the determinations of this law ought to have some weight in the present case: for though, upon reasons of religion and state, it is made no longer binding here in England; yet, in points which are not pontifical, we may still have respect for its authority, especially where it is founded upon strong and substantial grounds.

Now nothing can be more evident, than that, by the canon law, consanguinity extended no farther than the seventh degree. Nor will this, I apprehend, be disputed; and therefore we may spare ourselves a multitude of quotations, by referring such as may happen to doubt it, to the title below-cited^y. It may not however be amiss to observe the reasons which one canon^z gives for prohibiting matrimony within seven degrees: “*Nam in septem gradibus, si canonice & usualiter numerentur, omnia propinquitatis nomina continentur. Ultra quos nec consanguinitas invenitur, nec nomina graduum reperiuntur, nec successio potest amplius prorogari, nec memoriter ab aliquo generatio recordari.*”

^y *Decretum, part. 2. caus. 35. qu. 3. per tot.*

^z *Ibid. qu. 5. cap. 2.*

If this be not speaking plainly, it is hard to say what is : and though afterwards the prohibition of marriage was taken off, and confined to four degrees only; yet, as a learned author^b has justly observed, the extent and boundaries of consanguinity, which are here fixed and determined, have suffered no change or removal.

THAT these boundaries were received in England, at least by the clergy, would need no other proof, than that they were part of the canon law, for which our popish ancestors had the utmost regard and reverence. But it so happens, that this very constitution was adopted and enforced by a national synod here at home; namely, by the council held at London, A. D. 1102. 3 Henr. I. the twenty fifth canon^c of which runs thus;

*"ne cognati usque ad septimam generationem
ad conjugium copulentur, vel copulati simul
permaneant."*

LET us next examine into the reason of this determination of the canon law, and we shall find it equally applicable to the case be-

^a Decretal. lib. 4. tit. 14. cap. 8.

^c Wilkins concil. M. B. tom. 1.

^b Joan. Andreæ *declaratio arboris confang.* §. 18.

fore us. I do not contend for the greater *natural* propriety of stopping at the seventh, rather than at the sixth or eighth degree. Superstition perhaps might have a share in pitching upon the number, seven; and perhaps not. It it is at least *as* proper as any other number; and there was, it is plain, a necessity of stopping somewhere (as marriage with any of one's kindred was forbidden^d generally) or else, as in the college case, the kindred would be universal.

FOR the blood of the common ancestor, wherein consists the relation, is by a multitude of descents sluiced into so many different channels, and mixed with so many other bloods, that it can be no longer distinguished. Every man has in the first ascending degree two ancestors, in the second four, and, by the same rule of progression, in the seventh an hundred and twenty eight, in the tenth a thousand and twenty four, and in the twentieth above a million^e; and has, consequently, as many bloods in him as he has ances-

^d Decretum. p.2. caus. 35. qu. 3. c. 2.

^e This will seem surprizing to those who are unacquainted with the encreasing power of progressive numbers; but is palpably evident from the following

table of a geometrical progression, in which the first term is 2, and the denominator also 2: or, to speak more intelligibly, it is evident, for that each of us has two ancestors in the first de-

gree;

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tors. But how very minute a portion has he of the blood of a remote ancestor ! A person, for instance, one of whose ancestors in the fifteenth degree is the founder's father, has 32767 other ancestors in the same degree : that share of his blood therefore, which he derives from the founder's father, is only one 32768th part of his whole mass ; and how

gree ; the number of whom is doubled at every remove, because each of our ancestors has also two immediate an-

cestors of his own.

Lineal Degrees, Number of Ancestors.

1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072
18	262144
19	524288
20	1048576

A shorter method of finding the number of ancestors at any even degree is by squaring the number of ancestors at half that number of degrees. Thus 16 (the number of ancestors at four degrees) is the square of 4, the number

of ancestors at two ; 256 is the square of 16 ; 65536 of 256 ; and the number of ancestors at 40 degrees would be the square of 1048576, or upwards of a million millions.

much

much this boasted proportion may amount to, I leave to the curious to determine. A proportion it is, which the canon law does not so far regard, as to adjudge it an incestuous mixture, though it again be blended with blood derived from the same fountain; a proportion, which, one would think, should hardly entitle the possessor of it to any special share of affection from the rest of the descendants of the same ancestor.

BUT we may pursue this way of reasoning still farther. Half of this number of ancestors are male and half female: now, supposing each couple to leave at least two children, and every one of them two more, and so on; (a very moderate supposition; for, without it, the human species instead of increasing would be daily diminishing) we shall find, I say, upon this supposition, that all of us have now subsisting near two hundred and seventy millions of cousins in the fifteenth degree; deriving (one half of them) their kindred by different titles, but all at the same distance from the several common ancestors as ourselves are; over and above those, that are one or two descents nearer to, or farther from them, and who may amount to as many more'.

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more'. And if this calculation, which any one that pleases may soon examine, should

f This will swell more considerably than the former calculation; for here, though the first term is but 1, the denominator is 4; that is, there is one kinsman (a brother) in the first degree, who makes, together with the *proprietus*, the two descendants of the first couple of ancestors; and in every other degree the number of kindred must be the quadruple of those in that which immediately precedes it: for, since

each couple of ancestors has two descendants, who increase in a duplicate ratio, it will follow that the ratio, in which all the descendants increase downwards, must be double to that in which the ancestors increase upwards; but we have seen that the ancestors increase in a duplicate ratio; therefore the descendants must increase in a double duplicate, *i. e.* in a quadruple ratio.

Collateral Degrees.	Number of Kindred.
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

This calculation may also be formed by a more compendious process, *viz.* by squaring the couples, or half the number of ancestors, at any given degree; which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those

at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; it's half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several

appear incompatible with the number of inhabitants on the earth; it is because, by intermarriages among these several descendants, a hundred or a thousand different relations may be consolidated in one person, or he may be related to us a hundred or a thousand different ways. A strange labyrinth of confusion! from which nothing can extricate us, but the confining this diffusive ocean within some certain limits; for, by the same rule as before, if the inhabitants of our island be twenty millions, it is possible they may be all related to each other (and, of course, to the founder) within the thirteenth degree.

This computation will be more easily apprehended, and its moderation more plainly appear, when exemplified by a clear and indisputable fact. When the children of Israel migrated from the land of Egypt, they were one with another at no greater distance than the sixth⁸ lineal degree from Jacob their common ancestor. These amounted to 603550

several families within our own knowledge, and observe how far they agree with this account; i. e. whether, on an average, every man has not one brother or sister, four first cousins, fifteen second cousins, and so on; we shall find that the present calculation is very far from being over-charged.

^g Moses, Aaron, Korah, Dathan,

and Abiram were only in the fourth degree: (see Numb. c. 16. v. 1. &c. 26. v. 5 & 57.) Achan was in the fifth: (see Josh. c. 7. v. 1. 1 Chron. c. 2. v. 7.) Zelophehad and Naasson in the sixth: (see Matth. c. 1. v. 3. Numb. c. 27. v. 1.) and Bezaleel in the seventh degree. (See Exod. c. 31. v. 2. 1 Chron. c. 2. v. 18.)

fighting

fighting men, of twenty years old and upwards^b: to which if we add those males which were under twenty, and those which were superannuated, it will probably double the former number; and, being farther increased by the number of Levites (which extended to 22000¹) the total amount of the males will be 1229100. And, if we allow about the same number of females, the whole will amount to 2458200; whereas upon the preceding calculation, by allowing two children only to every couple of ancestors, the number of descendants in the sixth degree amounts only to 64.

IT is to prevent this amazing extension, which common arithmetic will demonstrate must in a few descents be equivalent to universality, without recurring to our former arguments; it is to prevent the name of relations from being used, when the thing is entirely lost; when the blood of the common ancestor is mingled, confused, and blended with a million of other bloods; it is upon these accounts that the canon law has fixed this boundary. And this is avowed by the most sensible and learned of the doctors; such as not only tell us the law, but the reason

^b Numb. c. 1. v. 45.

¹ Numb. c. 3. v. 39.

of it; and whose authority I quote, not for the sake of their names only, but for the unanswerable reasons they give for confining consanguinity within *some* limits.

AND first let us hear Estius, who defines^k collateral consanguinity to be “*vinculum eorum, qui ab uno aliquo descendunt per sanguinis propagationem, sic ut virtus stipitis in genito vel genitis perseveret:*” he goes on, “*ideo diximus, sic ut virtus stipitis, &c, quia, dum longius sit intervallum unius ab altero, virtus stipitis, movens ad ea quae sunt individui, tandem evanescit; et nomen consanguinitatis, simul cum affectione quae peculiaris inter consanguineos esse solet, extinguitur.*”

To this purpose also speaks Covarruvias, who observes^l that unless the *communis stipes* be confined to be *propinquus*, “*omnes homines consanguinei forent, cum ab Adamo omnes descendimur.*” The only question therefore is, when the *stipes* ceases to be *propinquus*, and begins to be *remotus*. The canon law, we have seen, adjudges that the *seventh* lineal ancestor is the most remote *stipes*, that collateral consanguinity can be derived from: and

^k In sententias. lib. 4. part. 2. dift. 40. §. 1. ^l Tom. 1. part. 2. cap. 6. §. 6.

Azo, like many other civilians, when speaking of consanguinity in general, subscribes to this determination. Let Covarruvias and him mutually explain each other: the former says^m, “*consanguinitas est vinculum personarum ab eodem stipite propinquorum descendientium;*” the latter givesⁿ us the bounds of this propinquity, “*consanguinitas est vinculum personarum ab eodem stipite descendientium intra septimam generationem.*” If therefore the *communis stipes* be not within the seventh generation from each party, the *virtus stipitis* and every tie of affection are, by both canonists and civilians, concluded to be worn out, and no descendants from that *stipes* can be kinsmen to each other.

THIS gradual failure of kindred is elegantly^o expressed by S. Augustin; and surely in searching for the pious founder's intentions, the sentiments of an antient Latin father^p may not be improperly mentioned. “*Fuit autem antiquis patribus religiosae curae, ne ipsa propinquitas, se paulatim propaginum ordinibus dirimens, longius abiret, et propinquitas esse desisteret, eam nondum longe posse*

^m *Ibid.*ⁿ *Summ. in lib. III. Inst. de grad. cognat. §. 14.*^o *De civit. Dei. lib. 15. cap. 16.*^p The college chapel is dedicated by the founder to the four Latin fathers.^{“ tam}

*"tam rursus matrimonii vinculo colligare, et
quodammodo revocare fugientem."*

IT appears then, from what has been here urged, that with regard to consanguinity, as it respects marriage, the canon law has established a notorious boundary; and that not wantonly, but upon very good reason, no less than the absolute necessity of such a limit: it appears, that the same reasons are equally forcible when applied to consanguinity in general, and the case of founder's kinsmen in particular: and we know that our own law will^a teach us, that "*ubi eadem est ratio, idem debet esse jus.*"

8. ANOTHER method of considering consanguinity by the laws, is in the case of refusing a judge, or challenging a juror upon that account. And this being also a question, wherein the whole extent of consanguinity comes under consideration, it has accordingly received a boundary here.

THE canon and civil laws allow the parties to refuse a judge for consanguinity, as being a probable suspicion of partiality. The latter indeed (which seems to permit^b a man

^a Co. Litt. 191.

^b Cod. 3. 1. 14. *et gloß. ibid.*

to

to refuse a judge, if he himself is of opinion he has any cause, without assigning what that cause is) is therefore in general very silent about what sort of consanguinity is, or is not, a good ground for recusation. The *lex Cornelia de injuriis* does indeed confine^s it in one case to the sixth degree, and this has been thought^t to be a good measure for all other cases; though Baldus seems^u rather for confining it to the fourth, while others^v would extend it to the tenth.

BUT the canon lawyers, who require a sufficient cause to be both alleged and proved, are more explicit. “*Si causa alicui fuerit de- legata*, says the law^x, *qui consanguineus fit illius qui literas impetravit, hujusmodi degatus non immerito potest recusari.*” The gloss proceeds, “*sed usque ad quem gradum intelligimus istam consanguinitatem? videtur quod usque ad septimum:*” and Baldus approves^y of this gloss, but adds, “*et hoc in transversalibus; sed in ascendentibus in infinitum.*”

^s *Ff.* 47. 10. 5.

^w Marant. *ibid.*

^t *Vid.* Marantae *spec. aur. part. 6.*
cap. 1. num. 62.

^x *Decretal. 2. 28. 36. et gloss. ibid.*

^u *In leg. 13. Cod. lib. 2. tit. 7.*

^y *In loc.*

By the common law of England, as it now^a stands, a judge cannot be challenged for consanguinity, or any other cause; though formerly, according to Bracton^b and Fleta^c, he might have been. But challenges to a jury, who are judges of fact, seem to answer the *recusatio judicis* of the Roman laws. Now consanguinity, or cosinage, is good cause of challenge to any of the jurors; nay, to the whole array, if the sheriff who impanels them be of kin to either party: but this exception of consanguinity does not hold *in infinitum*; as appears from numberless authorities; and, first, from a case^c in the year books, where a juror was allowed to be challenged for being related to one party, within the degrees of marriage; that is, says the book, within the *ninth* degree.

ONE would be tempted to imagine a mistake in the reporter or transcriber here, by substituting an *x* for a *v*, (*ix* for *iv*) no uncommon oversight in antient manuscripts; and that, instead of the *ninth*, it should have been the *fourth* degree; since no law, that I know of, did ever extend the prohibitions of

^a Co. Litt. 294 *a.*

^b Lib. 6. cap. 7.

^c Lib. 5. de exceptionibus. cap. 15.

^c Pafch. 41 Edw. 3. pl. 3.

marriage

marriage to the *ninth*; and, at the time when this case happened, the *fourth* was the utmost degree prohibited in any part of Europe. Accordingly we find that Fitzherbert, in reporting this very case in his abridgment, is express^d that the juror was in the *fourth* degree related to the plaintiff, and thereupon was set aside; but that it was said at the same time, that if they had been of kin in the *fifth* degree, so that they might have intermarried, the juror should have been sworn: “*Fuit dit que fils ussent estre de linage en le quinte degree, issint que il puit estre maries, que il usst este jurr’.*”

HOWEVER this may be, the mistake (if any) appears to have been of very long standing; the case, as it is now reported, has served for a leading one to subsequent determinations; and the number, *nine*, whether originally fixed upon by design or accident, has been established as the boundary of that consanguinity, which is cause of challenge. This we may learn from Brook’s abridgment^e; “*Et nota, per curiam, quod cosinage al ix degree est bon principal challenge, quod nota.*” The margin refers to the year book, which

^d *Tit. challenge. pl. 99.*

^e *sod. tit. pl. 480.*

is^f as follows ; “ Choke dit, si le juror soit al
 “ ix degree cosin al party, si il poit monstret
 “ coment cosin, est bon challenge, quod omnes
 “ concefferunt.” And accordingly, in the case^g
 of Vernon and Manners, an array was quashed,
 because the sheriff was cousin to the de-
 fendant in the ninth degree ; the common
 ancestor being nine generations above the
 sheriff, and seven above the defendant. On
 the other hand, it appears from another case
 in the book^h of assises, that a challenge to
 one in a *very remote* degree was dis-allowed ;
 so that it is plain that the cosinage, which is
 cause of challenge, does not extend *in infi-*
nitum.

THIS matter may be farther illustrated
 from what is said by Glanvil ; who, speaking
 of the institution of the *grand assise*, by king
 Henry the second, in lieu of the barbarous
 and gothic custom of *duelling*, lays down thisⁱ
 general rule for challenges or exceptions to
 the jury ; “ excipi autem possunt juratores eis-
 “ dem modis, quibus et testes in curia christiani-
 “ tatis juste repelluntur.” If therefore jurors
 were to be challenged, in the same manner

^f Mich. 21 Edw. 4. pl. 37.

^g Plowd. 325. Dier. 319.

^h Lib. 40. pl. 20.

ⁱ Lib. 2. c. 12.

as witnesses were set aside in the ecclesiastical courts; and witnesses were there set aside (for consanguinity) only to a certain degree; it will follow, that jurors could not be challenged beyond a certain degree, for any cosinage or alliance of blood. And that the civil and canon laws, which are properly the rule in our^x ecclesiastical courts, did not extend that exception *in infinitum*, will appear from the next article.

IN the mean time we may observe, from Finch, the reason why cosinage is a good challenge; which is the same that must be assigned for the peculiar advantages given by the founder to his kinsmen. "Cosinage," says he¹, "in the sheriff is a good principal chal-
"lenge to the array; and in a juror to the
"poll; although it be to the ninth degree,
"and that one cannot be heir to the other of
"the land in variance.—The reason whereof
"is, for the affection, which the law in-
"tendeth that one doth carry to the other." If therefore the affection may be supposed to be dissipated at a certain period in the one case, it is hard to say why it should not also cease at a like period in the other.

^x Hale's history of the law. ch. 2.

¹ Law. b. 4. c. 36.

9. CONSANGUINITY is again considered in another light, by the civil^m and canonⁿ laws; namely, by ordaining that kinsmen should not be received to give evidence for, or compelled to give evidence against, each other. But here also the kindred is circumscribed within boundaries; for it extends, in the utmost^o latitude of construction, only to the *seventh* degree. In France, as we learn^p from Domat, this exception is at present extended to the children of second cousins; which are in the *seventh* degree by the civil, and the *fourth* by the canonical computation. The municipal laws of England are strangers to any such exceptions, save only as to husband and wife; whose love or aversion being supposed extremely violent, they are for the most part^q excluded from giving testimony, either for or against each other.

10. Note that kindred is totally disregarded by the common law, with regard to actions, and other judicial proceedings; since a man may maintain a suit for his kinsman,

^m *Ff. lib. 22. tit. 5. l. 4 & 5.* ^o *Gloss in Ff. 22. 5. 4. Corvin.*
Cod. 4. 20. 5. *in Cod. 4. 20. 5. Marantae spec. aur.*

ⁿ *Decretum. part. 2. caus. 3. qu. 5. part. 6. c. 1. n. 2.*
c. 1 & 10.—caus. 4. qu. 2 & 3. c. 3. ^p *Part. 2. b. 3. tit. 6. §. 3. c. 8.*
§. 4. ^q *Co. Litt. 6 b.*

without

without incurring the penalties of the statutes against maintenance. But as this seems to be confined to the *prochein amy*, or next of kin, it is of little importance to the present case, whether there are, or are not, any farther limits set to it: a case in the civil law, which bears some analogy to this, being much more to the purpose. A lawyer, who was promoted to be *advocatus fisci*, (or, as we should call it, king's counsel) was not^t permitted to plead in common causes; with an exception however to the private causes of himself, his wife, his lineal ancestors and descendants, and also his collateral cousins; but with regard to these last, the exception is not *in infinitum*, but only to the fourth degree.

II. THE next light, in which the laws have considered consanguinity, is with regard to the distribution of the *personal* estate of an intestate. Now the duration of kindred, and manner of contemplating it, by the civil law, being much the same here, as in the case of succession to *real* estates, we need only refer to what has been before said upon that subject. And as to the law of England, which is in this particular the statute of distribution^s,

^r Co. 2 Inst. 564.

^t 22 & 23 Car. 2. cap. 10.

^s Cod. 2. 7. 13.

it directs that the personal estate of an intestate shall, upon failure of wife and issue, be divided among the *next* of kin to the intestate in equal degree, and their representatives; but that no representatives be admitted among collaterals, after brothers' and sisters' children. Now this being also a case wherein proximity is attended to, I shall not take the pains to inquire how far, in theory, the kindred may be here supposed to extend: nor indeed should I take any farther notice of it, if it were not for an argument of lord chief justice North, in a case^u which arose upon the construction of this statute; the whole of which contains a great deal of sound reasoning upon consanguinity in general, and part of which is very much to the present question.

THE doubt was this; *what* brothers and sisters should be allowed to be represented; whether the brothers and sisters of the *next* *collaterals*, or those of the *intestate* only; or, whether the children of an intestate's deceased aunt should come in for her share among his other aunts, as the children of a deceased sister would have done among his other sisters. The chief justice delivers his opinion,

^u Carter v. Crawley. 33 Car. 2. B. R. Raym. 496.

that

that the brothers and sisters of the *intestate only* were intended, which is now the established law: and therein he accounts why representation is allowed *in infinitum, lineally*; but only to a particular degree, *collaterally*; the general reason of which is applicable to all cases of consanguinity, which must be allowed to last for ever in the *right* line, though not in the *transverse*.

"IT is, says he^w, an obligation upon every man to provide for these descended from his loins; and, as the administrator is to discharge all other debts, so this debt to nature should likewise exact a distribution, to all that descend from him in the lineal degrees, be they never so remote: and, because those which are more remote from him, have not so much of his blood, therefore the measure should be according to the stocks; more, or less, as they stand in relation to him. Upon this reason representations are admitted to *all* degrees in the *lineal* descent. There is no such obligation to the remote kindred in the *collateral* line; therefore they are not regarded, but in respect of *proximity*, as they are *next of kin*." And again^x; "remoter degrees have no re-

^w *Ibid.* 500.

^x *Ibid.* 505.

"gard

"gard, but for their *proximity*; because there
"are none nearer." He concludes, thus, the
application of which is extremely easy; "I
"conceive this act was intended for a plain
"rule; and I think it much better to inter-
"pret it in the most plain and obvious sense,
"(which will establish the succession of per-
sonal estates according to reason and sym-
metry) than to strain to find out another
sense for the sake of *remote* kindred, that
"are of *no* regard; which will produce ap-
parent absurdities, and subject personal estates
"to fanciful and intricate disputes."

12. THE last light, in which I can recollect that consanguinity has been considered, is in a case the most similar of any to that before us, though not absolutely the same; the case of a general legacy to ALL of one's kindred. Here, if kinsmen were admissible *in infinitum*, the legacy would be (according to what has been before urged) to all mankind: but the laws have avoided this absurdity, by confining it among certain particulars only.

AND first, with regard to the civil law, let us hear Paulus de Castro, a very eminent

y Ibid. 506.

lawyer,

lawyer, and the founder's cotemporary; who determines^z upon the very point. “*Testator, qui erat presbyter, in suo testamento inseruit talem clausulam; item lego cuilibet de consanguineis meis decem fl. auri. Quaeritur, qui ad legatum erunt admittendi?*” After many learned arguments, he answers, “*quod omnes usque ad septimum gradum.*” Mantica indeed differs from him as to the degree; to which he^a prefers the *tenth*, on the authority of Baldus; but agrees with him that there must be *some* limitation. “*Debet intelligi usque ad decimum gradum, quia eo usque pretenditur et defertur successio; & ideo qui vult admitti tanquam ex progenie ad fideicommissum, debet probare se in aliquo gradu qui non fit ultra decimum.*” So that if we are to look upon the founder's provision, as a legacy to **ALL** of his kindred, as has been the opinion of some; we find that, according to Paulus de Castro, none are entitled to that legacy beyond the *seventh* degree, or, according to Baldus and Mantica, the *tenth*; but all agree that they are not to be admitted *in infinitum*.

THE same point has also been frequently determined in the court of chancery with

^z *Consil. 1. 384.*

12. *num. 46.*

^a *De conseq. ult. volunt. lib. 8. tit.*

us; and it has been settled that such legacies shall not extend to the kindred *in infinitum*. The limits indeed, established by that court, are not any particular degrees, but the statute of distribution in general; which, the lord chancellor said^b, "He thought the best measure for setting bounds to such general words." The same has been determined in divers^c cases; and this in order to prevent that confusion and absurdity which must necessarily ensue, if no bounds are set to such general words. For, "it was said^d by the master of the rolls, and admitted by Mr. Vernon, and others, to be settled; that where one devises the rest of his personal estate to his relations, without saying what relations, it shall go among all such relations, as are capable of taking within the statute of distribution: else it would be uncertain, for the relation may be infinite." The amount of all which is no more than this, that such bequests are totally void for their uncertainty; and the legacy is distributed as if, *quoad hoc*, the testator had died intestate.

^b In the case of Roach v. Hammond. *Pafcb.* 1715. *Prec. Chanc.* 410.

^c Carr v. Bedford. *30 Car.* 2. 2 Ch.

Rep. 8vo. 146. — Griffith v. Jones, *ibid.* 394. — Thomas v. Hole. *Cas.* temp. Talbot. 151.

^d 1 P. Wms. 327.

If therefore the founder's statute is to be interpreted as his will would have been, in our present courts of equity, it must be entirely disregarded; and his fellowships distributed, as if, *quoad hoc*, he had made no statute; for that is the method in chancery of disposing of such general legacies: or, at least, no persons can claim a fellowship by consanguinity to him, but such as would be entitled to his personal estate, in case he were now to have died intestate. The consequence of which is, that no person can lay claim, who has a father, uncle, or other ancestor living, related to the founder; nay, no one can (or ever could) lay claim, than whom there is *a nearer* relation living in any part of the world. But this would be a most unreasonable exclusion! It may therefore be justly doubted (as was hinted at the beginning of this essay) whether the founder's statute ought to be interpreted by *our* rules for interpreting of wills. What however may be properly collected from hence, is this; that our courts were evidently sensible of the inconveniences, that would be introduced by infinitely extending such general legacies; and have therefore applied a remedy that was sufficiently adapted to the case before them, by vacating the whole

whole for it's uncertainty, and distributing the legacy in a course of administration, which is usually the most equal disposition of any. How far *such* a remedy can be, with justice, applied to the case of founder's kinsmen, I shall not undertake to determine, but leave to be considered by proper judges.

THESE are the several lights, so far as can be at present recollect'd, in which consanguinity has been considered by the civil, canon, and common laws: and it is hoped, that upon a fair and candid examination of the authorities here cited, the truth of the proposition set out with will clearly appear: "that where consanguinity in general, and "not proximity, is the object of any of those "laws, it is never extended *in infinitum*." Farther than this it is impossible to go, in maintaining a negative proposition; unless by calling upon and challenging the warmest adversaries to this truth, to produce a single instance, wherein consanguinity is professedly extended without any boundary; except in such cases only, where proximity is the thing attended to. The boundary indeed is not always the same: the third, the fourth, the sixth, the seventh, the ninth, and tenth degrees

grees have been severally established as limits for particular purposes ; but it is never extended without *any* limit. And the variety of bounds that we find in different laws, as different exigencies required, is so far from being an argument against establishing any bound at all, that it is a very strong one in favour of it ; since it is thereby manifest, that all legislators have, at all times, agreed in the *necessity* of the thing, though they differed in the *manner* of accomplishing it.

NOR will it be to any purpose to object, that part of the citations here made, from the common law, are with regard to customs either quite, or almost, antiquated at this day ; since they were in full force and vigour at the time when the college statutes were compiled. Besides, we are to look into the general reason of laws, in order to apply them to the case before us ; since a case exactly parallel is not to be met with in our books : and the reason of our antient laws is at least as good as that of our more modern ones ; nay, the reason of the laws now in use is not always to be found, without having recourse to those, which custom or statutes have abolished. In short, it is at any time idle to object to antient and established determinations,

tions, unless it can be shewn that modern resolutions have been otherwise; much more in the present instance, where we are looking not so much into the practice of any one law in particular, as the principles of all laws in general.

AFTER what hath been here urged, from the general principles of law and reason, it will not be amiss to exemplify these principles, by stating the particular and very parallel case of the society of New college in Oxford, and it's sister society near Winchester; which were both founded by William of Wykeham, about the close of the fourteenth century. In his statutes there is exactly the same preference given to his kindred in elections, as there is by the statutes of Chichele; and, in about two hundred years after the foundation, the same inconvenience began to be felt from the growing number of reputed founder's kinsmen. Sensible of this inconvenience, the college of Winchester rejected a claimant; whose father thereupon applied (as the manner then was) to the court of chancery, and not to the visitor, for relief. And, after a solemn hearing, 30 january, 22 Eliz. *A. D.* 1579, it was recommended by the lord keeper Bromley, and assented to on all sides, for the difficulty

difficulty of judgment to be given, and it was so decreed; that the plaintiff's issue, for four descents, should be admitted *as if* they were founder's kinsmen, and that he should renounce all farther claim to the blood of the founder^e: which renuntiation was accordingly regularly made.

ABOUT ten years afterwards, the fathers of two other rejected candidates applied to the same tribunal for a similiar relief. Whereupon the lord chancellor Hatton, "gravely considering that the public benefit of the realm, for the education of scholars in learning (chiefly intended by the founder) would greatly be hindered, if every of the children of the said complainants (allowing them to be of the undoubted blood of the founder) should be admitted into the said colleges, being at this instant many in number, and in a short time likely to spread, increase, and grow into more generations, sufficient of themselves to fill the number of both colleges," referred the whole to bishop Cooper, who then sat in the see of Winchester, and, as such, was the visitor of both societies. The bishop, having duly considered the case, in order to shew a grateful remem-

^e Wykeham v. Stempe, warden of Winton. *In archivis coll. Wint.*
F brance

brance of so worthy a work as the founding of two colleges, declares himself willing to pay a regard to such as even seem to be of the founder's blood; "so that the same tend not to the annoying, disturbance, or prejudice of the said foundations; which the founder undoubtedly meant to make for the public benefit of the whole realm, and not to be appropriated and made peculiar to one only kindred and family." He then states the vast encrease of the claimants; whereby he observes "that, if it be not in wisdom foreseen, the number of scholars in both colleges is like to be fully supplied by such reputed kinsmen, be they apt or not apt to be brought up in learning; so that the public benefit intended by the founder would be frustrated." He afterwards remarks, (what is equally true of every other antient college, and particularly that of All Souls) that the revenues of the society had been much augmented by other benefactors, strangers to the founder's blood, who could never intend to confine their bounty within such a partial chanel. "In consideration whereof, and for avoiding inconveniences as might come, if one blood, consanguinity, and kindred should have both colleges in their possession and regiment," he declares the founder's

der's intention to have been, that the education of scholars should more largely extend than to his own kindred, and yet that some convenient regard should be paid to those of his undoubted blood: and therefore the bishop directs, that there shall not be at one time above the number of eighteen reputed kinsmen in the two colleges, (which consist, by the way, of a hundred and forty scholars) *viz.* eight in New college, and ten in that of Winchester; and that not above two shall be admitted at any one election into either college^f: thus substituting a limitation in point of number, in lieu of what had been established by the lord keeper Bromley, and what is now contended for by the college of All Souls, a limitation in point of degree.

AT the distance of near fifty years, this matter was again reconsidered, on a petition (as it seems) to the king in person. For there is extant^g an order, dated 31 January, 1637, made by William archbishop of Canterbury, the earl of Arundel and Surry, earl-marshall, and Walter bishop of Winchester, to whom it was referred by the king to consider of the claim of another Wykeham. This they determine to be groundless: founding their o-

^f Ex archiv. coll. Wint.

^g Ibid.

pinion on the decree of 30 January, 1579; and also on the great inconvenience that would follow, if the founder's consanguinity should be "so exceedingly multiplied as it would be, to the absolute restraint of the freedom of elections, if such claims were admitted."

DURING the time of the usurpation, A.D. 1651, the same question was again brought before the committee of the house of commons, for regulation of the two universities and the colleges of Eaton and Winchester; probably with a view to re-establish the unlimited preference of kindred, through the interest of a noble family with the powers which then bore rule. But all they could obtain, even from that partial tribunal, was an order^h for augmenting the number of eighteen kinsmen, established by bishop Cooper, to twenty in both societies; with a proviso, that if more than twenty had already crept in, no more should be admitted till the number was reduced to twenty. Hence it seems, that the bishop's injunction had either been over-ruled by the parliament-visitors, when they new-modelled the society of New college, among others, in their memorable proceed-

^h *Ibid.*

ings

ings A.D. 1647 and 1648; or else had in part been neglected by the college itself, in like manner as it is at present. For it must be acknowledg'd, that by some inattention in the electors, which it is not easy to account for, though the annual restriction (of two) continues in use to this day, yet the total restriction, (of eighteen) has fallen into utter oblivion.

FROM this series of determinations by chancellors, by visitors, and other personages of weight and distinction, it appears, that lord chancellor Clarendon did not hastily, and *currente calamo* only, decide as he has done (though not in his judicial capacity) upon the very point in question. For speaking of lord Say and Sele, (whose family were parties to some of the former adjudications) he saysⁱ,

"he had been a fellow of New college in
"Oxford: to which he claimed a right, by
"the alliance he pretended to have from Wil-
"liam of Wickham, the founder; which he
"made good by a far-fetched pedigree through
"so many hundred years, half the time
"whereof extinguishes all relation of kin-
"dred."

ⁱ Hist. of the rebellion, book 6, near the end.

III. THE last rule, that can be made use of for interpreting the intentions of the founder, is by^k considering his character, profession, and learning, the age in which he lived, and other circumstances of the same nature; according to that saying^l of Cicero, “*qua in sententia scriptor fuerit, ex caeteris ejus scriptis, factis, dictis, animo, atque vita sumi oportebit.*”

AND here we are not so much to consider the many shining qualities, which distinguished this great and venerable prelate as a statesman, and a primate; as a patron of all kinds of learning, and the two illustrious seats of it; as a steady and zealous defender of the rights of the church of England, the prerogative of the king, and the liberties of the people, against papal encroachments, when Rome was in the zenith of her power. These strong and notorious lines of his *public* character are not at present the object of our contemplation. Let us here consider him in a more *private* view; as an ecclesiastic; as a doctor of civil and canon law, and remarkably eminent in the knowlege of both; the

^k Puffend. ubi *supr.* §. 6 & 7.

^l *De inv. II. 42.*

lumen legis, as he is^m styled by Lyndewode : let us recollect the age in which he lived, wherein the canon law was in the highest vogue and most universal esteem : let us observe what a regard he professes to have both for that and the civil law ; declaringⁿ them to be “*pro regimine politico perquam utiles et necessariae* ;” the favour he shews to his jurists, and particularly his^o canonists ; and how sollicitous he seems^p to be that the knowlege of these laws should flourish in his society : let us, lastly, consider the permanent benefit he meant to confer on his college ; by exempting them, as much as in him lay, from the jurisdiction of the common law, (for which the clergy had in his time no great reverence) and appointing his successor their visitor, who was sure to determine all differences by the rules of the canonists : let us duly reflect upon all these considerations, and we shall find it reasonable to imagine, that the consanguinity, intended by the founder, is of the same nature with that treated of in the canon law.

IT is therefore submitted, with the utmost deference, to the judgment of such, whose undoubted province it is to fix a boundary to

^m *Provinc. ad init.*

^o *Statut. passim.*

ⁿ *Statut. de totali numero, &c. ad init.*

this

this relationship, whether the canonical limit, of the SEVENTH degree, does not seem to be better entitled to be the limit here, than any other whatsoever. For that it *must* be bounded somewhere is, I hope, no longer a doubt, after what has been here urged ; especially when we consider farther, that the same inference may be fairly drawn from the sentence of the most reverend prelate, by whom the first appeal against a college-election was decided ; and whom we may suppose not averse to the extension of kindred, having himself married a descendant of the Chichele family. He determined ^p that the then appellant was of the founder's blood, and ejected the persons chosen by the college, as being “*mere extraneos, et “dicto fundatori in nullo consanguinitatis gradu “conunctos.*” And the same is also virtually implied in every subsequent sentence, wherein judgment of *ouster* has been given. The argument therefore will stand thus : if there are no limits to consanguinity, all men must be related to the founder in some degree or other ; but it is expressly determined that some men are in no degree related ; the consequence of which is, that consanguinity must have some limits. What these limits are, is therefore the only question remaining ; and that they

^p *Decretum reverendiss. in Christo patr. Guil. Wake. 5 Jun. 1723.*

may

may in some way or other be finally ascertained is the whole, I apprehend, that the society desire, and have been for these many years endeavouring at. There seem at present to be tolerably good reasons for confining it within the **SEVENTH** degree; but if *any other* degree shall, upon better reason, be determined to be more proper, acquiescence under lawful authority is undoubtedly the duty of inferior judgments.

HAVING drawn out this argument to so great a length, it is now high time to relieve the readers from so dry, and, to most of them, uninteresting a subject: but it may be expected, that I should take notice of an objection or two, that have been raised to the doctrine here contended for, from the words of the statute before us; and upon which some stress has been laid, as if they necessarily implied the perpetual duration of consanguinity.

THE first is, that the founder ordains a preference to be given to his kinsmen "*in OMNI electione futuris temporibus facienda;*" and hence it is argued, that the founder thought

thought there must, or might, be kinsmen subsisting at ALL future elections.

To this it may be answered; first, that however general the words may be, taken nakedly and by themselves, yet they are afterwards restrained by the particularity of others, with which they must be connected. The preference is appointed to be given to the kinsmen, only “*si qui tales sint;*” which words as much imply a possibility of their failing, as the other do a possibility of their *subsisting*. The whole clause^s of the statute runs thus:

— “*volumus, quod in omni electione scholarum praedictorum futuris temporibus in dictum collegium facienda, principaliter et ante omnes alios illi qui sunt vel erunt de consanguinitate nostra et genere, si qui tales sint, ubicunque fuerint oriundi, dum tamen sint reperti bables et idonei secundum conditiones superiorius et inferius recitatas, sine aliquo probacionis tempore in veros dicti collegii socios ab initio elegantur, et etiam admittantur.*”

We see, that if the former part of the clause should seem to suppose that they might last for ever, the latter as plainly supposes they might not: from hence therefore we cannot infer the necessity of a perpetual duration.

^s Statut. *de modo et forma et tempore eligend.*

BUT farther, we cannot even infer the *possibility* of it; for the words, “*in omni electione futuris temporibus facienda*,” are words which operate upon all the remaining parts of the statute, as well as upon this *provisionary clause*; and in these there are, undoubtedly, *perpetual directions given, or such as may be in use for ever.* It was therefore necessary, at the head of this branch of the statute, to make use of such comprehensive words as might reach the whole of it; and yet, they are not to be applied, in their utmost latitude, to every part. Some parts, as the year of probation for instance, are intended to be observed for ever; but no parts can be longer observed, let the expression be as general as it will, than while their objects continue to exist. It no more follows, that because in ALL elections *kinsmen* are ordered to be preferred, therefore *kinsmen* may last for ever; than it would, supposing *nephews* were ordered to be so preferred, that *nephews* also might endure throughout all ages. When words, that signify *perpetuity*, are applied to such things as are in themselves of a transitory nature, common sense will teach us to understand that *perpetuity*, as meaning no more than the *utmost*

most duration, of which the thing it is applied to is capable.

A PARALLEL instance may perhaps more fully explain this matter. In the canons of 1603, it is enjoined, that “before ALL sermons, lectures, and homilies, preachers and ministers shall moove the people to joyne in prayer (*inter alia*) for our soveraigne lord king James, our gracious queen Anne, and the noble prince Henry.” But will any one thence conclude that archbishop Bancroft, and the other makers of that canon, imagined, that king James, &c, would live as long as sermons were preached, or lectures read? or would even a jesuit argue from thence, that the church of England enjoined prayers for the dead? Certainly not. The word, ALL, will be understood with this restriction as to them, “so long as they continue to be the subjects of prayer;” and be taken in it’s most extenfive sense only with regard to those things that are of a permanent nature; “the holy catholike church, the ministers of God’s word, &c.”

I HAVE been the more minute in examining this argument from the words of the statute,

* Canon Iv.

because

because from the air of triumph with which it is generally urged, it is looked upon, I imagine, as unanswerable. However, I should hope, that this is a very full answer. But even supposing it be not so, supposing that, in their primary and most obvious sense, the words imply a perpetual duration of kindred; would that alone be sufficient to silence all objections, and solve the otherwise unsurmountable difficulties of such a construction? I may venture to say, it would not. There is no rule more certain, or more universally useful than this, which has been before mentioned;” “*ubi verba nullum aut absurdum sensum post se effent tractura, a receptioni sensu paulisper erit deflectendum.*”

BUT again, we are told that, in another statute, the founder orders that “*custos et socii universi dicti collegii, infra regnum Angliae existentes, tam nostri consanguinei quam alii, qui pro tempore fuerint, erga festum nativitatis domini in perpetuum, habeant vestes de una et eadem secta, &c;*” and hence these ingenious gentlemen draw the same conclusion, in favour of the perpetuity of founder’s kinsmen.

^s Puffend, *ubi supr.* §. 6.

^t Statut. *de communi annua vestitu, &c.*

To this argument, if we may venture to call it so, the same answer will serve as to the foregoing ; with this additional remark, that, according to their own way of reasoning, the *alii* must endure for ever in the college as well as the *consanguinei*; whereas we have shewn that if consanguinity be infinite, and of course universal, there can be no *alii* subsisting. In like manner as, by the other argument, the election of *scholars* must confessedly continue for ever; whereas if consanguinity be extended to any very great distance, and much more if it be unlimited, there can be no election of *scholars*; but all must at once be elected *fellows*, which is the prerogative of founder's kinsmen, and that salutary provision, of a year of probation, must entirely fall to the ground. And thus much for this piece of verbal criticism.

ON the whole, it is submitted to calm and impartial judgments, whether the college, in the reluctance they have expressed to admit persons to the privilege of kinsmen in degrees far remoter than any that are above considered, have (as is malevolently suggested by some) acted a part unbecoming the character of gentlemen

tlemen, of scholars, or of clergymen ; of persons who are bound, by the strongest ties of religion and gratitude, to pay a proper regard to the blood of their munificent founder ; but yet who are at the same time under equal obligations, NOT to pay that regard, unless where it is really due ; who think it their duty to distinguish and separate true claimants from the false ; and who owe that respect to their founder's memory, as to endeavour to vindicate his meaning from gross absurdities, and palpable contradictions.

IF what is contained in the foregoing pages be really the truth, as the writer has the greatest reason to believe it is, the consequence must be left to the equitable determination of him, in whose patronage and protection the college is at present happy. If, on the other hand, there be any misrepresentations of fact, any wrong citations from authorities, or any false reasoning either from those facts or authorities, of none of which the author is at present conscious, he hopes at least that it deserves from such as think differently, and may receive an answer.

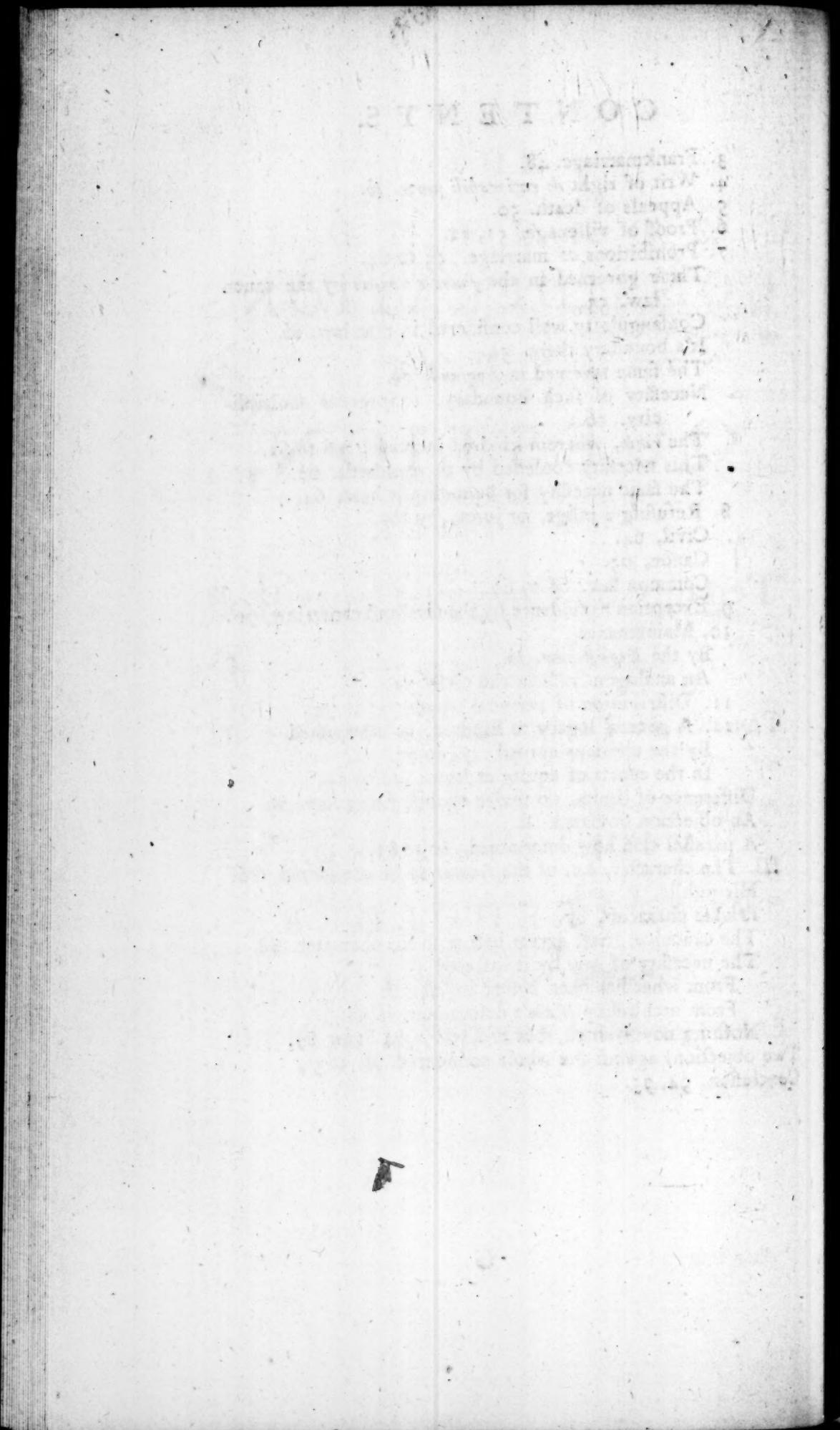
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CONSIDERATIONS
ON THE
QUESTION,
WHETHER

Tenants by Copy of Court Roll

ACCORDING TO

The CUSTOM of the MANOR,

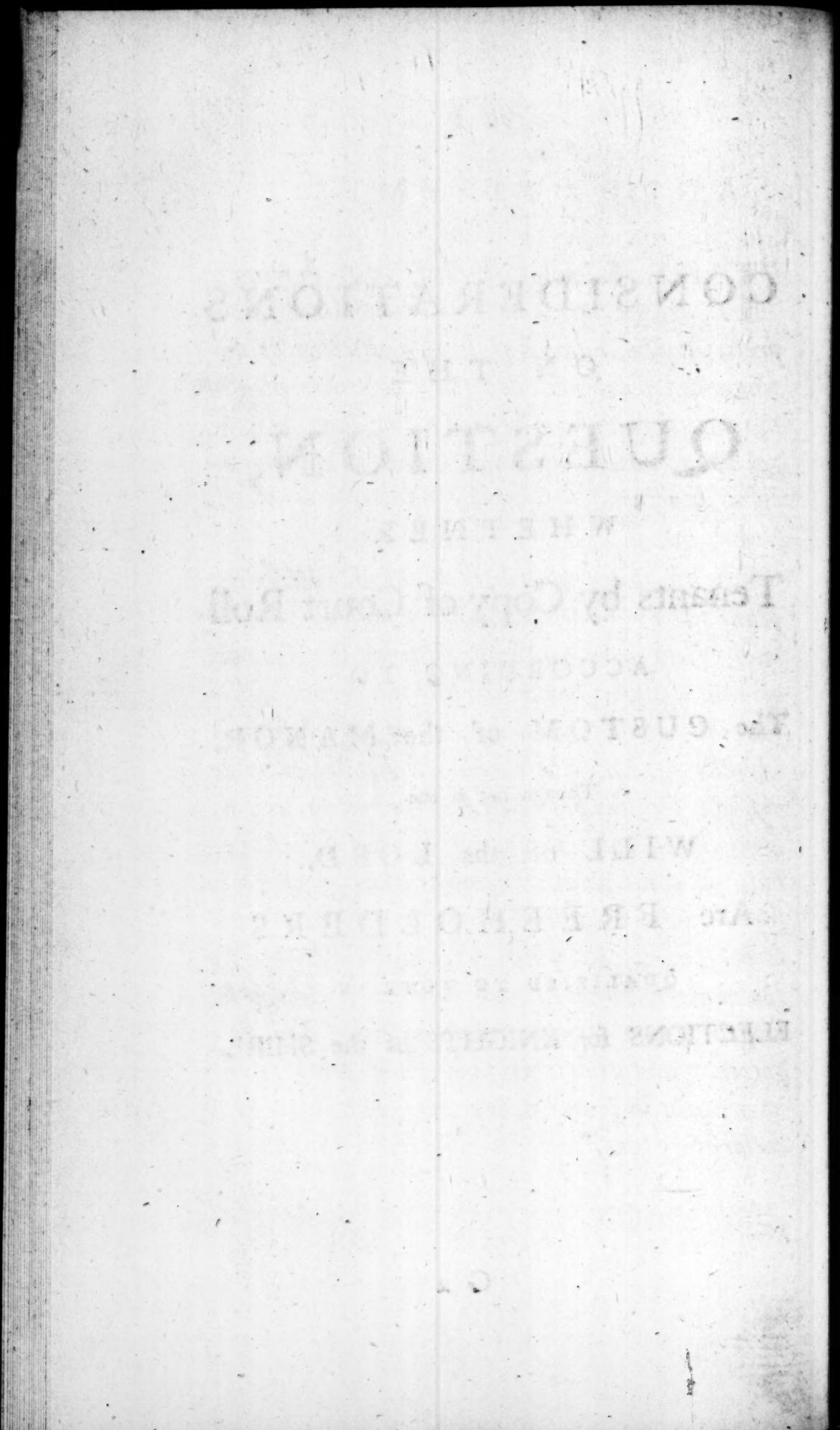
Though not at the

WILL of the LORD,

Are FREEHOLDERS

QUALIFIED TO VOTE IN

ELECTIONS for KNIGHTS of the SHIRE.



ADVERTISEMENT.

THE following treatise was originally drawn up, and is now committed to the press, at the instance of some gentlemen of distinguished senatorial abilities; who are pleased to imagine that from thence a few hints may be gathered, not wholly unseasonable at this particular juncture^a.

IN a country where the right of election depends upon a mode of tenure, which the elector must testify upon oath, the distinguishing marks of that tenure should be clear and express, beyond all possibility of doubt. It is therefore universally agreed to be necessary, that, in order to obviate the doubts which have lately arisen, some line should be drawn by the legislature; but, at what point to draw it, has given room for variety of sentiment. It is here attempted to be shewn, that this line is already drawn by the masterly hands of our ancestors; though by length of time it is somewhat obscured and forgotten: and that therefore there seems to be no occasion to frame a new rule, but only (by a declaratory law) to revive and assert the old one.

^a See votes of the house of commons, Mercurii 1 die Martii, & Lunae 6 die Martii, 1758.

IT is no easy matter to foresee, in any one county of the kingdom, what effect this doctrine may have upon this or that particular interest; much less throughout the kingdom at large. The aim of this enquiry has been to investigate the truth, not to sacrifice it to private attachments. The author therefore hopes, that these papers will be read with the same degree of candour with which they were compiled; and that such as examine them attentively will pardon any inaccuracies of composition or style, which may have escaped his notice in the course of a hasty publication.

11 Mar. 1758.

CONSIDERATIONS, &c.

T H E

C A S E.

A. B. has an estate of above forty shillings *per annum*, within the manor of C. which is holden by copy of court roll, to him and his heirs for ever, according to the custom of the manor, (but not said to be "at the will of the "the lord") paying the accustomed rent, and performing the accustomed services. This estate cannot (by the custom of the manor) be aliened or conveyed by feoffment, fine, or recovery in the king's courts of common law,

law, but must for that purpose be surrendered into the hands of the lord, and the person to whose use it is surrendered must be thereupon admitted tenant in the court baron of the manor,

The Question is,

WHETHER A. B. is a freeholder, within the meaning of the laws now in being, so as to entitle him to vote in the election of knights of the shire?

AND it is conceived that he is clearly no freeholder, within the meaning of those laws; for which opinion the reasons here follow at large.

*6 Chitt
59 b.
n 1*

IN all constitutions absolutely popular, or in the democratical part of any mixed state, the authority of the people in the management of public concerns is exercised by vote or suffrage. In little republics that suffrage has usually been given in person, by every individual freeman of the state : but in England, where it is impracticable for *all* the freemen of the nation to debate and give their voices in a collective body, they do it by representation ; and, of course, in this kingdom, the authority of the people is exerted in the choice of representatives to sit in the house of commons.

IT is therefore a matter of no small consequence to the public, to state with clearness and impartiality what persons have, or have not, the privilege of giving their voices in the choice of these representatives. This is here endeavoured to be done with regard to the case before us ; in consequence of a more diligent, and perhaps a more dispassionate, search, than the

the hurry and attachments of those gentlemen, of all denominations, who considered this question about three years ago, would then permit them to make.

UPON the true theory and genuine principles of liberty, every member of the community, however mean his situation, is entitled to a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. And this ought to be allowed him in every free state, provided it be probable that such a one will give his vote freely, and without influence of any kind. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, (whose suffrages therefore are not so properly their own, as those of their superiors, on whom they depend;) all popular states have therefore been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals (whose wills may be supposed independent) more thoroughly upon a level with each other.

WITH regard to the qualifications of electors of knights of the shire, to sit in the British house

house of commons, it must first be remembered that we are not to enquire at present what *would be* the best and most equitable constitution for this purpose, according to the modern state of property in this country; but what really *is*, and long has been, our legal constitution in this point. Were we now to frame a new polity with respect to the qualifications of voters, reasons might perhaps be suggested why copyholders, even holding at the nominal will of the lord, and the owners of beneficial leases for a term of years, should be admitted to this privilege as well as freeholders; and why the value of freeholds themselves should be greatly advanced above what is now required by law to entitle the proprietor to give his vote in county elections. But this would be removing foundations; or at least pulling down the superstructure, and erecting another in it's stead. The laws under which we now act, have subsisted for more than three centuries; and, till the constitution is new-modelled, these are the only criteria for deciding the present question.

To explore therefore the intention of these laws, our enquiries must be carried back to the period in which they were made; we must examine the reasons for making them, and for confining

confining the right of suffrage to the persons therein described ; and we must consider what persons were then understood to fall within that description ; for these persons only can properly be admitted to the privilege of voting in elections.

OUR legal antiquarians are of opinion, that originally all landholders, or barons, who held immediately of the king *in capite*, had seats in the great council or parliament, till about the reign of king John ; when, by the many alienations and minute subdivisions of property, the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the greater barons to attend in person, leaving the small ones to sit by representation (together with the citizens and burgesses) in another house ; which gave rise to the separation of the two houses of parliament *.

THE representatives of these inferior barons being usually knights, (or such as held a knight's fee at the least, and were therefore liable to knighthood) and being returned out of every county in the kingdom, were thereupon denominated KNIGHTS of the SHIRE.

* Selden. tit. of hon. 2. 5. 21. Gilbert. hist. of the excheq. c. 3.

In what manner, and at what time, the election of those knights of the shire was invested in the county at large, which formerly was confined to the king's tenants *in capite* only, is a point pretty difficult to determine; and, when determined, would rather be matter of curiosity, than at all necessary to explain the question before us. It will be sufficient for us to take up the matter, as it stands upon record in our statutes; an evidence upon which we may build more safely, than upon any the most plausible hypothesis or ingenious conjecture of the learned. The first of these statutes is that of 7 Hen. IV. c. 15. which directs the knights of the shire to be elected in the county court: a court, to which all the freeholders are suitors; and wherein therefore formerly the elections of sheriffs and conservators of the peace were held, and wherein the coroners and verderors are still chosen. This statute ordains these knights to be elected by "al that be there present, as well sutours duely summoned for the same cause, as other;" meaning probably thereby to restrain the partiality of sheriffs, (which is complained of in the preamble) who summoned what freeholders they pleased, and admitted only those to vote who were actually summoned; whereas the statute

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statute (as I understand it) now directs him to admit the votes of all suitors present, whether duly summoned or no.

BUT whether it was that the ambiguity of this expression afforded room for those who were no suitors, (that is, no freeholders) to claim a vote at the election, or whether only every minute freeholder was admitted to poll, without any restriction as to value, which is still the case with regard to coroners and verderors; we find in a short time afterwards complaint made, in the preamble to the statute of 8 Hen. VI. c. 7. that "electyons of
"knyghtes of the shyres in many counties
"now late have ben made by very great, out-
"ragious, and excessyve nombre of people,
"dwellynge within the same counties, wherof
"the moste partie was of people of smal sub-
"staunce and of no valour, wherof every of
"them pretended a voyce equivalent, as to
"suche electyons to be made, with the moste
"worthye knyghtes and esquyars dwellynge
"within the same counties :" for remedy
whereof it is therefore enacted, "that the
"knyghtes of the shyres shall be chosен by
"people dwellyng and resyaunt in the same
"counties, wherof every one shall have FREE
"LAND OR TENEMENT to the valour of fourty
"shelynges

"shelynges by yere at the least above all charges;" and that the sheriff may examine the voters on oath how much they may so expend. This statute is explained and amended by another in the next parliament, 10 Hen. VI. c. 2. which recites, that the **FREEHOLD**, required by the late statute was not expressly mentioned and directed to be *within* the county for which the election is to be made; wherefore, for plain declaration thereof, it is ordained that every elector "shal have **FREEHOLD** to the valoure of fourty shelynges "by yere at the leſt, above al charges, within "the same countie where any ſuche choſer wyl "medle of any ſuch electyon." And upon these statutes stands the law of all county elections at this day; for the statute of 18 Geo. II. c. 18. is, with regard to this point, entirely built upon and transcribed from these.

THE question therefore will be briefly this; whether the species of tenants now before us were deemed to have *free land* or *tenement*, (or to have *freehold*) at the making of these statutes in the reign of Henry the sixth? And this it is apprehended they were not deemed to have; and consequently are not freeholders at this day, within the meaning of these acts of parliament.

BUT,

BUT, in order to shew more clearly what estates held by this tenure are *not*, it may first be proper to state what it is imagined they *are*; since they do not very often fall within the consideration even of our most practiced lawyers. And they seem to be no other than what were well known to our antient law under the denomination of estates in **PRIVILEGED VILLENAGE, or VILLAN-SOCAGE**; which tenure *chiefly* subsisted in manors of *antient demesne*. And lands and tenements, holden by this tenure, are apprehended not to have been **FREE** lands and tenements at the common law. In support of which opinion in both it's branches, it is here undertaken to be shewn, first, that these estates are estates in villan-socage: secondly, that estates in villan-socage were never comprized under the denomination of free lands or tenements.

I. THERE seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services;

services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services such as were not unbecoming the character of a soldier, or a free-man, to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants, or persons of a servile rank; as to plow the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent; or to plow such a field for three days. The *uncertain* depended upon unknown contingencies; as to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villan service.

FROM the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England, till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the third) seems to give the clearest

H and

and most compendious account, of any author antient or modern^b; of which the following is the outline or abstract^c. “Tenements are “of two kinds, FRANK-TENEMENT and “VILLENAGE. And, of frank-tenements, “some are held freely in consideration of “homage and KNIGHT-SERVICE; others in “FREE SOCAGE with the service of fealty “only.” And again^d, “Of villenages some “are pure, and others privileged. He that “holds in PURE VILLENAGE shall do what-“soever is commanded him, and always be “bound to an uncertain service. The other “kind of villenage is called VILLAN-SOCAGE; “and these villan-socmen do villan services, “but such as are certain and determined.” Of which the sense seems to be as follows: first, where the service was *free*, but *uncertain*, as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare*, or by knight service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, &c, that tenure was called *liberum*

^b l. 4. tr. 1. c. 28.

^c Tenementorum aliud liberum, aliud
villenagium. Item, liberorum aliud tene-
tur libere pro homagio et servitio militari;
aliud in libero socagio cum fidelitate tan-
tum. §. 1.

^d Villenagiorum aliud purum, aliud §. 5.

privilegiatum. Qui tenet in puro villena-
gio faciet quicquid ei praesceptum fuerit,
et semper tenetur ad incerta. Aliud ge-
nus villenagii dicitur villanum socagium;
et hujusmodi villani socmanni — villana-
facium servitia, sed certa et determinata.

socagium,

focagium, or free focage. These were the only *free* holdings or tenements; the others were *villenous* or *servile*: as, thirdly, where the service was *base* in it's nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was *base* in it's nature, but reduced to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be still called focage (from the *certainty* of it's services) but degraded by their *baseness* into the inferior title of *villanum focagium*, villan-focage.

BESIDES these *lay* tenures, there subsisted, and still subsists, another which is a *spiritual* tenure, called the tenure *in libera eleemosyna*, or *frank almoign*; the tenants in which were bound only to perform *divine* service; and by which all ecclesiastical persons and corporations now hold their lands and tenements, and have so done at least ever since the time of Bracton^c. “Also of frank-tenements another is that of *pure*, *free*, and *perpetual alms*; which exist as well in such things as

^c Item, liberorum [tenementorum] aliud purae et liberae et perpetuae eleemosynae; quae quidem sunt tam in bonis hominum quam in bonis Dei: lum Deo et tali ecclesiae, sed abbatibus et prioribus ibidem Deo servientibus. 1. 4. tr 1. c. 28. §. 1.

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" are the property of man, as in those that
" are the property of God: for they are given
" not only to God and to such a church, but
" also to the abbots and priors serving God
" therein." Those who hold by this tenure are
freeholders in the strongest sense; and therefore any portions of tythes or other ecclesiastical dues, held either by spiritual persons, or by such lay appropriators as have succeeded them in their estates and immunities, are freehold estates, whether the lands out of which they issue are bond or free; being a separate and distinct inheritance from the lands themselves. And, in this view, they must be distinguished and excepted from other incorporeal hereditaments issuing out of lands, as rents, &c; which in general will follow the nature of their principal, and cannot be freehold unless the stock from which they spring be freehold also.

BUT although the clergy be thus indisputably freeholders, in right of the church, yet as till within a century past they were not taxed to the subsidies granted by the commons in parliament, but only to those granted by their own ecclesiastical synod or convocation, they therefore sent only proctors to the convocation, and not representatives to parliament;

ment; having no votes for knights of the shire^f till 1664; when being taxed for the first time to the lay subsidy or assessment, (by the statute of 16 and 17 Car. II. c. 1.) the ecclesiastical subsidies were thereupon laid aside; and the clergy in recompence were admitted to vote for knights of the shire^g. This admission of the clergy to the right of suffrage rather seems to have arisen from universal tacit consent, dictated by the reason of the thing, than from any positive law: for there appears no statute of that time, or resolution of the commons in their journals, which expressly or impliedly directs such admission; till the statute of 10 Ann. c. 23. which mentions "presentation to a benefice" as a means, whereby such a freehold as entitles to a vote may be acquired. But let us return from this digression to our lay tenures.

THESE appear from what has been premised to have been originally four.

1. THE tenure in CHIVALRY, or by KNIGHT-SERVICE, was evidently derived from that northern system of military policy, which spread itself over all the western world at the dissolu-

^f Dalton of sheriffs. 418.

hist. of G. B. II. 163.

^g Gilb. hist. of excheq. c. 4. Hume's

tion

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tion of the Roman empire, called the doctrine of fiefs or feuds. This was the highest and most honourable tenure of all; but at the same time, by means of it's feudal rigours, was exceedingly burthensome to the subject: wherefore, about the middle of last century, having fallen into neglect during the civil wars, it was finally abolished by act of parliament at the restoration of king Charles the second; and all lands holden thereby were directed to be holden by the next species of tenure. Therefore

2. THE tenure in FREE AND COMMON SO-CAGE (which was also in some degree of a feudal nature, but accompanied with greater immunities than the former) is that whereby all free lands and tenements in the kingdom are at present holden, except those in *frank almoign*, whereof we have just now spoken. Lands and tenements, holden by this tenure, may be aliened from one man to another, without the aid and assistance of any third person, by feoffment with livery of seisin, or other usual conveyances by deed: they cannot be sued for or recovered in any court but the king's public courts of common law: they are not liable (when held in fee-simple) to any other forfeiture than only for treason and

and felony: and their tenants or owners are the proper suitors to the county court, wherein the law has directed all elections by freeholders to be made.

3. THE tenure in PURE VILLENAGE was that wherein the antient *nativi*, or villeins by birth, originally held their scanty pittances of land, by the most base and sordid services, and absolutely *at the will of the lord*; being neither permitted to hold them against the lord's inclination, nor to quit them without his permission. A person, free by birth, might indeed take lands to hold by this tenure; and, in such case, he was also removeable at the will of the lord; but, on the other hand, might also quit and renounce the tenancy, whenever he himself thought proper. For he was bound to perform those servile duties only, as Bracton expresses it^h “*nomine ville-nagii, et non nomine personae;*” in respect of the tenure of his land, and not his own personal condition. But he informs usⁱ, that “he that is tenant in villenage, whether he ‘be freeman or bondman, shall do for his ‘villan-service whatsoever is commanded him,

^h *I. 4. tr. 1. c. 28. §. 5.*

ei praeeptum fuerit, nec faire debet sero

ⁱ *Ille qui tenet in villenagio, siue liber quid debeat facere in crastino, et semper siue seruos, faciet de villenagio quicquid tenebitur ad incerta, Ibid.*

“nor

"nor is intitled to know in the evening the
"task he must perform in the morning; but
"shall always be bound to an uncertain ser-
"vice." In the same manner the Mirroir also
observes ^k, "if they hold lands of their lords,
"it is to be understood that they hold them
"from day to day, at the will of the lords,
"and not by any certain services." The ori-
ginal of this tenure is variously assigned by
different writers. The most antient account
we have of it is in the old dialogue *de scac-
cario*^l, attributed to Gervase of Tilbury;
and which Mr. Madox is of opinion ^m was
composed in the reign of king Henry the
second. We are there told, that this was
the condition to which the natives of Eng-
land were reduced, after their total conquest
by the Normans. Others, with more rea-
son, have supposed that the state of villenage
is in some degree a monument of Danish
tyranny. But whatever their original might
be, these pure villeins are now, by the as-
sistance of custom, and a series of immemo-
rial indulgence, arrived nearly to the same
state *in fact* as the privileged villeins of whom
we shall next speak; though there is still a

^k Si tenent fiefs le seigneurs, est à taine de services. c. 2. §. 28.
entendre que ils le tiennent de jour en jour
à la volonté des seigneurs; ne per vuul cer-

^l l. i. c. 10. p. 26.

^m Pref. p. vi.

great

great *nominal* distinction between them. For they are now sprouted up into the usual sort of modern copyholders, who still hold *at the nominal will of the lord*, though regulated according to the custom of the manor. “For copyholders, saith Fitzherbert,”^a is but a new-found term; for of antient times they were called tenants in villenage, or by base tenure.” These, it is agreed on all hands, though they have now by custom a sure and indefeasible estate so long as they perform their services, (which are pretty generally turned into pecuniary rents) have no right to any vote, as freeholders; whatever their interest may be, whether for life, in tail, or in fee-simple. Some modern statutes have indeed by express provisions permitted them to serve on juries, as *liberos et legales homines*; but this is a plain indication, that, till the legislature made them so in this instance, they were held not to be so in any.

4. THE fourth and last tenure is that in PRIVILEGED VILLENAge, or VILLAN-SOCAGE; of which we are principally to enquire. And Bracton^b gives this account of its original:

^a *Nat. Brev.* 12 c.

^b *Fuerunt in conquestu liberi homines, qui libere tenuerunt tenementa sua, per libera servitia vel per liberas consuetudines; et cum per potentiores effent ejecti, postmodum reversi recenterunt eadem tenementa sua tenenda in villenagio; faciendo inde opera servilia, sed certa et nominata. Qui quidem*

" There were at the time of conquest certain
 " free men, who held their respective tene-
 " ments freely, by free services or by free
 " customs ; and, being first ejected by the
 " hand of power, they afterwards returned,
 " and took their own tenements again, to be
 " held in villenage ; doing therefore services
 " that were base and servile, but certain and
 " expressed by name. These are called ascrip-
 " titious to the soil, and yet are freemen,
 " though they perform villan services ; since
 " they perform them not in respect of their
 " persons, but in respect of their *tenures*. And
 " therefore they shall not have an assise of
 " *novel disseisin*, because their tenure is vil-
 " lenage, although of the privileged kind ;
 " nor yet an assise of *mort d'ancestor* ; but
 " only the little writ of right, according to
 " the custom of the manor. And they are
 " therefore called ascriptitious to the soil, be-
 " cause they enjoy this privilege, that they
 " cannot be removed from the land, so long
 " as they can discharge their bounden renders ;
 " nor can they be compelled to hold such

dem dicuntur glebae ascriptitii, et nibilo-
 minus liberi, licet faciant opera servilia ;
 cum non faciunt ea ratione personalium sed
 ratione tenementorum. Et ideo assisam no-
 vase disseisinae non habebunt, quia tene-
 mentum est villenagium, quamvis privile-
 giatum ; nec assisam mortis antecessoris ;

sed tantum parvum breve de resto, secun-
 dum consuetudinem manerii. Et ideo di-
 cuntur glebae ascriptitii, quia tali gaudent
 privilegio, quod a gleba amoveri non po-
 terint, quamdiu solvere possunt debitas pen-
 siones ; — nec compelli poterint ad tale ten-
 ementum tenendum nisi voluerint. l.1. c.11.

" their

"their tenements unless they will." And again^p; "There is also another kind of vil-
"lenage, which is held under our lord the
"king from the conquest of England, and is
"called villan-socage; and is indeed villenage,
"but however of a privileged kind. The
"tenants therefore of our lord the king's
"demesnes have this privilege, that they
"ought not to be ejected from their lands,
"so long as they will and can perform the re-
"quisite service; and villeins of this kind are
"properly called ascriptitious to the soil. Yet
"they perform villan services, but such as are
"fixed and determined. Nor can they be
"compelled against their wills to hold this
"kind of tenement, and therefore they are
"said to be freemen. But they cannot give
"away their tenements, nor transfer them to
"others by way of gift, any more than pure
"villeins can; and therefore, when a transfer
"is necessary to be made, they restore them

^p Est etiam aliud genus villenagii, quod tenetur de domino rege a conquestu Angliae, quod dicitur socagium villanum; et quod est villenagium, sed tamen privilegium. Habent itaque tenentes de dominicis domini regis tale privilegium, quod a gleba amoveri non debent, quamdiu velint et possint facere debitum servitium; et bujusmodi villani socmanni proprie dicuntur glebae ascripti. Villana autem faciunt servi-

tia, sed certa et determinata. Nec compelli poterunt contra voluntatem suam ad tenenda bujusmodi tenementa, et ideo dicuntur liberi. Dare autem non possunt tenementa sua, nec ex causa donationis ad alios transferre, non magis quam villani puri; et unde, si transferri debeant, restituunt ea domino vel baliivo, et ipsi ea tradunt aliis in villenagium tenenda. l. 4. tr. 1. c. 28. §. 5.

" to the lord or his bailiff, who deliver them
" over to the others to be held in villenage."

THE author of Fleta likewise, who wrote under Edward the first, gives much the same account of them^a. " These were formerly free men and free holders ; some of whom, being ejected from their tenements by more powerful hands, afterwards returned and re-took the same to be held in villenage. And, because such tenants are acknowledged for the king's own husbandmen, they are therefore privileged not to do suit at the county court, or the hundred-court, nor to be returned upon any inquest, assise, or jury. Their tenements are the privileged villenage of the lord. And they are therefore called ascriptitious to the soil, because they ought not to be removed from lands of this kind, so long as they discharge their boun- en renders : nor can they be compelled to

^a Erant olim liberi homines libere tenentes, quorum quidam, cum per potentiores a tenementis suis ejecti fuerant, eadem postmodum in villenagium tenenda resumperunt. Et, quia hujusmodi tenentes cultores regis esse dignoscuntur, provisa fuit quies ne sectas faciant ad comitatum, vel hundredum, vel ad alias inquisitiones, assisas, vel juratas. — Horum tenementa sunt villenagium domini privilegiatum. Et ideo dicuntur glebae ascriptitii, eo quod ab hujusmodi glebis amoveri non debent, quamdiu soberint debitas pensiones : nec compelli poterunt ad hujusmodi tenementa tenuenda contra suas voluntates, eo quod corpora sunt libera. — Provisum est etiam, quod hujusmodi tenentes inter se tantum unicum beneficium habeant recuperationis tenementorum, per quoddam breve de recto clausum ballivo manerii dirigendum, quod plenum rectum teneat querenti secundum consuetudinem manerii. l. 1. c. 8. §. 2.

" hold

“ hold these tenements against their wills,
 “ because their bodies are free. It is also pro-
 “ vided, that tenants of this sort shall have
 “ among themselves one only method of re-
 “ covering their tenements at law, by a cer-
 “ tain writ of right close to be directed to the
 “ bailiff of the manor, that he do complete
 “ right to the complainant according to the
 “ custom of the manor.”

To these we may subjoin the authority of Britton, who was cotemporary with the author last cited, and wrote by the command and in the name of king Edward the first¹.
 “ And some there are, who are free of blood,
 “ and hold lands of us in villenage, and are
 “ properly our sokemen; and these are privi-
 “ leged in this manner, that no man ought to
 “ oust them from such their tenements, so
 “ long as they perform the services which to
 “ their tenements are appendant; nor can any
 “ man encrease or change their services, so

¹ *Et ascun gents sount, que sount fraunks de faunk, et tenant terre de nos en villeinage, et sont proprement nos sokemans; et ceux sount privileges en tele maner, que nul ne les doit ouster de tielz tenemens, taunt come ils sount les services que a lour tenemens appendant; ne nul ne poit lour services acréfier ne cbaunge, a faire auters services ou plus, autrement que ils ne solument. Et pur ceo que tielz sokemans sount*

nos gaynours de nos terres, ne volons mye que tele gents soient solumens de nule part travailler en jures ne enquêtes, forsque en maners a queux ils appent. Et pur ceo que nous volons que ils eyent tele quiete, est ordine le brefe de droit clos pleadable par baillife del maner (de tort fait a l'un sokeman par l'autre) que il teigne les plaintys a droit, solonc les usages del maner, par simples enquêtes. c. 66. p. 165.

“ that

" that they should do any more or other ser-
 " vices than as they have been accustomed.
 " And because that such sokemen are the
 " tillers of our lands, we will that they be
 " not summoned in any wise to pass upon
 " juries or inquests, except in the manors to
 " which they belong. And because that we
 " will that they enjoy such privilege, there is
 " ordained the writ of right close pleadable
 " before the bailiff of the manor (for wrong
 " done to one sokeman by another) that he
 " do the plaintiff right, according to the cus-
 " tom of the manor, by a simple inquest."

THIS is farther confirmed and illustrated by the description of a sokman given us by the compiler of the old Natura Brevia;⁵ which seems to have been contemporary with the statute we are now explaining, being written about the reign of king Henry the sixth.
 " Note, that a sokman is properly one who is
 " a freeman, and holdeth of the king, or other
 " lord of antient demesne, lands or tenements
 " in villenage; and he is privileged in this

⁵ Nota que sokman proprement est tel qui est frank, et tient de roy, ou d'autre seignouer d'ancien demesne, terres ou tenementes in villenage; et est privilege in cest maner, que nul luy doyt oustre hors de ces terres ne tenementes, tanque come il puit faire les services queux a ces terres et tene-
 mentes appertegnent. Ne aucun poe ses services accrofer, ne confreigner a faire plusours servicez, que faire ne doit. — Et nul sokman poe empleder auer sokman de terres ne de tenementes deinz ancien demesne per autre brief que cest brief de droit clos. — Tit. brief de recto clauso.

" manner,

"manner, that no one ought to oust him
"from his lands or tenements, so long as he
"can do the services which appertain to those
"lands and tenements. And no one can in-
"crease his services, or make him perform
"more services than he ought to do. And
"no sokman can implead another sokman of
"lands or tenements within antient demesne
"by any other writ than this writ of right
"close."

By considering the several properties of tenants in villan-socage, as they may be gathered from these antient authors, we shall find so striking a resemblance, that we may easily be convinced they still subsist in that species of tenants, which are the subject of our present enquiry: and this in much the same state as formerly; save only that their villan services are turned into money-rents, as well as those of pure villeins. For we must not (with some) degrade these tenants into the rank of *puri villani*, or common copyholders, by supposing the words "at the will of the lord" to have been omitted in their copies by fraud or accident; neither must we (with others) raise them into the degree of *liberi socmanni*, or common freeholders, by forgetting all their badges of villenage.

I. THE first point of resemblance between the two species of tenants is this; that most of the manors in which they were antiently, or are now to be found, are manors of *antient demesne*; and those few which are found in other manors, may be fairly supposed to have had their original in imitation of these, by convention or compact with the lord. Antient demesne, *antiquum dominicum regis*, consists of those manors, which (though now perhaps granted out to private subjects) were actually in the hands of the crown in the reign of Edward the confessor, and at the accession of William the conqueror; and so appear to have been by the great survey in the exchequer called Domesday book^t. In these manors, according to the old authors above cited, were to be found all the four species of tenants we have mentioned: for, besides their own peculiar species, “*sunt feoda militaria, et liberi tenentes, et puri nativi, sicut alibi in regno*.” And for the prevention of the encroachments of the pure villeins, who seem to have aspired to the state of villan-socmen, endeavouring by exemplifications of Domesday book to enfranchise their bodies and change the condition of their tenures, was the statute of

^t Fitz. n. b. 14, 16.^u Flot. l. 1. c. 8.

1 Ric. II. c. 6. enacted. But though these manors had the other species of tenants in common with the rest of the kingdom, yet this mixed kind of tenants, or villan-socmen, were almost peculiar to themselves; as still is the case with regard to our copyhold tenants, who hold not at the will of the lord: for these are chiefly to be met with in manors of antient demesne, or else in manors that bear a near relation to the crown, being parcel of the duchy of Cornwall^w, or the old principality of Wales^x.

2. THEY are not members of the county-court; i. e. not suitors, or amesnable to the same. “*Non sectas faciunt ad comitatum,*” says the author of *Fleta*^y, speaking of villan-socmen; and the same is generally true of the tenants which are now before us.

3. BOTH of them have the same indelible character of incapacity to aliene by feoffment, lease and release, or other usual conveyances by deed, and the same necessity of surrendering them for that purpose in court, to the lord or his steward. Thus much is implied in the words “*dare,*” and “*causa donationis*

^w Carthew, 432.

^x Cro. Car. 229.

^y *Ubi supr. l. 1. c. 8. §. 2.*

“*transferre*:” for the antient writers of the law, says lord Coke ², called a feoffment *donatio*; and he adds, that the verb *do* or *dedi* is the aptest word of feoffment. Let us then observe these emphatical words of Bracton, above cited ³: “*dare autem non possunt tene-*
 “*menta, nec causa donationis ad alios trans-*
 “*ferre, non magis quam villani puri; et unde*
 “*si transferri debeant, restituunt ea domino vel*
 “*ballivo, et ipsi tradunt aliis in villenagium*
 “*tenenda.*” Which in our modern law-phrase would run thus. “They cannot convey their lands by feoffment, any more than common copyholders can; but must surrender them to the lord or his steward; who give *seisin* thereof to the *cestuy que use*, to be holden by copy of court roll.”

4. NEITHER of these tenants could or can sue or be sued for their lands, by the usual real actions of *assise*, writ of entry, &c, in the king’s courts of common law. “*Assisam non habebunt*,” says Bracton ⁴. And therefore no fine can be levied, and no common recovery suffered in the king’s courts, of lands holden by these tenures. For those well-known fictions of law are grounded, the one upon the

² Co. Litt. 9.

^b L. 1. c. 11.

^a L. 4. tr. 1. c. 28. §. 5.

supposed

supposed commencement, the other upon the supposed determination, of a suit or real action at law. But the only method of recovering these tenements is by a peculiar method of process, called a writ of right close. “*Unicum habent beneficium recuperationis per quoddam breve de recto clausum,*” says the author of *Fleta*^c; with whom Bracton agrees, as well in the passages above cited, as also (among others) in the following^d: “In the demesnes of our lord the king, that is, in privileged villenages, neither the assise of *novel disseisin*, nor the assise of *mort d' ancestor*, nor any other writ can run, except the little writ of right close according to the custom of the manor.” And again^e: “In the king's demesnes there doth not lie an assise of *mort d' ancestor*, nor of *novel disseisin*, because there is no freehold but only privileged villenage; nor doth even the great writ of right: because in lieu of all there is had the little writ according to the custom of the manor.” And in this point

^c *I. i. c. 8. §. 2.*^d *In dominicis domini regis, sc. in affisa mortis antecessoris, nec novae disseisine, villenagis privilegiatis, nec affisa novae disseisine, nec affisa mortis antecessoris, nec aliud breve, nisi tantum parvum breve de recto secundam consuetudinem manerorum, currit. I. 4. tr. 1. c. 9.*^e *Nee in dominicis domini regis jacet**affisa mortis antecessoris, nec novae disseisine, quia ibi non est liberum tenementum villenagium privilegiatum; nec etiam breve de recto magnum: quia loco omnium accipitur parvum breve secundam consuetudinem manerii. I. 4. tr. 3. c. 13. §. 3.*

also Britton, and the rest of the antient authorities before cited, concur.

5. LASTLY, as the villan-socman was distinguished from the pure villein, in that he could not be removed from his estate at the will of the lord ; “ *a gleba amoveri non debet, quamdiu velit et possit facere debitum servitium* ;” so, since this will of the lord is by custom become merely nominal, the same nominal distinction is kept up between the common copyholders and this privileged sort ; the words “ at the will of the lord ” being still preserved in the copies of the former, and totally omitted in those of the latter ; which omission is indeed almost the only difference now remaining betwixt them ; common copyholders having arrived (by a series of encroachment on their lords) at nearly the same estate of enfranchisement, which the privileged copyholders alone enjoyed by the antient law.

FARTHER to confirm what has been said, lord Coke^f (giving an account of these tenures, which he calls copyholds of frank tenure) observes that they “ are most usual in antient demesne : though sometimes out of antient demesne we meet with the like sort

^f Copyholder, §. 32.

“ of

"of copyholds; as in Northamptonshire there
 "are tenants which hold by copy of court
 "roll, and have no other evidence, and yet
 "hold not at the will of the lord." And so
 Mr. Kitchen^g says, "I have seen in the coun-
 "ty of Northampton copyholders of frank te-
 "nure, out of antient demesne; and they
 "have used a writ of right close, and have
 "no other evidence but by copies, according
 "to the custom of the manor; but their co-
 "pies are not at the will of the lord." And
 again^h, "in surrenders of lands in antient de-
 "mesne of frank tenure, it is not used to say,
 "to hold at the will of the lord, in these co-
 "pies; but to hold according to the custom
 "of the manor, by the services before due;
 "and it is not said there, at the will of the
 "lord." To these may be added Mr. West;
 whoⁱ first lays down the general definition of
 a copyholder; "he which is admitted tenant
 "of any lands or tenements within a manor,
 "that time out of memory of man have been
 "demisable and demised to such as will take
 "the same, in fee, feetail, for life, years, or
 "at will, according to the custom of the said
 "manor, by copy of court roll of the same
 "manor. And therefore they be called te-

^g Of courts. tit. copyhold.^h tit. court of antient demesne.ⁱ Symboleography. §. 603.

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"nants by copy of court roll, because they
"have no other writings or evidence concern-
"ing such their lands and tenements, but
"only the copies of the rolls of the courts of
"the manors, within which they lie." And then ^k he distinguishes the present species of
copyholds from others, thus: "In some ma-
nors, the tenants have the lands granted
"unto them and their heirs, in fee, feftail;
"or for life, or years, according to the custom
"of the manor; and not at the will of the
"lord according to the custom: in which case
"the rolls and copies ought to be made ac-
"cordingly." All which proves, that the omis-
sion of these words in it's original was neither
fraudulent nor accidental, but is a badge well
known to the law, as a kind of family-dif-
tinction between such copyholds as are de-
scended from pure, and such as are from pri-
ileged, villenage.

THE whole that has been here advanced
may be exemplified by a copy of court roll,
to be found in the old Chartuary, or col-
lection of antient deeds and forms in convey-
ancing^l, which is called *copia curie secun-*

^k §. 605.

bic in plena curia examinati, sursum red-
^l Ad curiam tentam ibidem quinto die diderunt in manus domini unum messua-
aprilis anno regni regis Edvardi quarti gium et dimidiā virgatam terre cum
undecimo, M. B. de C. et A. uxor ejus, suis pertinentiis in N. prediēlo vocatam
P. ad

dum consuetudinem manerii, and follows in these words : “ At the court there holden the fifth day of April in the eleventh year of the reign of king Edward the fourth, M. B. of C. “ and A. his wife, being here in full court examined, surrendered into the hands of the lord one messuage and half a yard land with their appurtenances in N. aforesaid, (called P.) to the use of W. C. of Oxford. Whereupon there fall to the lord for an heriot two shillings. And hereupon came the said W. and took of the lord the said messuage and half yard land with their appurtenances, to have and to hold to him and A. his wife, and the heirs and assigns of the said W. for ever, according to the custom of the manor, by the rents, customs, and services thereof heretofore due and accustomed. And they give to the lord for a fine, for their entry into the said messuage and half yard land with the appurtenances ten shillings, and did their fealty to the lord, and seisin is given them thereof.”

P. ad opus W. C. de Oxon. Unde accidunt domino de barieto, ij s. Et super hoc venit predictus W. et cepit de domino dictum messuagium et dimidiam virgatam terre cum suis pertinentiis, babendum et tenendum sibi, et A. uxori sue, hereditibus et assignatis ipsis W. in perpetuum,

secundum consuetudines, et servitia inde prius debita et consueta. Et dant domino de fine, pro ingressu suo babendo in dicto messuagio et dimidia virgata terre cum pertinentiis, x s; et fecerunt domino fidilitatem, et data est eis inde seifina.
fol. 368. edit. 1534.

THIS

THIS seems to be convincing evidence, that these tenures are of the same nature with Bracton's villan-socage; being chiefly found in ancient demesne; the tenants not amenable to the county-court; the lands not transferrable but only by surrender; not capable of a recovery at common law, but only by writ of right close according to the custom of the manor; and though held by copy of court roll, yet not at the will of the lord. Those who imagine them to be of any other species of tenure, would do well to inform us what that tenure is, and to support their opinion with authorities equally cogent.

TAKING this then for proved, that the tenants in question are of the nature of villan-socmen; it will next be our business to shew,

II. THAT these estates in villan-socage are not comprised under the denomination of FREE LANDS AND TENEMENTS, OR FREEHOLD, within the meaning of the statutes of Henry the sixth.

AND here it will be necessary to distinguish two senses of the word *franktenement* or *freehold*; the ambiguity of which expression hath occasioned the principal embarrassment to such

as

as have already considered this question. By the word “*freehold*” then is sometimes meant the *interest* or estate itself which the tenant holds in the land, sometimes the *tenure* by which that estate is holden. Thus Bracton ^m: “A freehold is that which a man holds to “him and his heirs, or for life only, or in “the same manner for any indeterminate “time. — Also it is sometimes called a “freehold, to distinguish it from that which “is villenage.” Therefore a tenant in fee-simple, feftail, or for life, is said to have a freehold *interest*, whatever his *tenure* may be: but none except he who holds, or did hold, by knight’s service, in free socage, or in *frank almoign*, can be said to have a freehold *tenure*. In like manner lord Coke ⁿ; (though perhaps, to make complete sense of this passage, we must transpose the words *land* and *law*, which seem to have been misplaced by his printer) “a freehold is taken in a “double sense: either ‘tis named a freehold “in respect of the state of the *land*, and so “copyholders may be freeholders; for any “that hath an estate for his life, or any greater “estate, in any land whatsoever, may in this

^m *Liberum tenementum est id quod quis tenet sibi et heredibus suis; — item ad vitam tantum; vel eodem modo ad tempus indeterminatum.* — *Item dicitur*

liberum tenementum, ad differentiam ejus quod est villenagium. l. 4. tr. 1. c. 28.
§. 1.

ⁿ *Copyholder.* §. 15, 16, 17.
“sense

" sense be termed a freeholder: or in respect
" of the state of the *law*; and so it is op-
" posed to copyholders, that what land soever
" is not copyhold is freehold. Now it seems
necessary that, in order to make a complete
freeholder, to vote at elections, both these
ingredients must concur: he must be a free-
holder, both in point of interest, and in point
of tenure: he must have at least an estate for
life, and that estate must be in free land, or
land holden by free services. But these villan-
socii, though they may have a freehold in-
terest, and therefore (it must be allowed) are
sometimes denominated freeholders in our
books; yet their land is not free but villan
land, and therefore they are in no instance
denominated absolutely freeholders, but with
a qualification superadded, viz. *customary* free-
holders; and, in this case as in all others, *ad-*
ditio probat minoritatem.

THAT such as have a freehold interest only
in lands, and not a freehold tenure, are inca-
pable of voting at elections, will appear by
considering the consequences of the opposite
doctrine; which would be the allowance of
all copyholders, of the basest kind, to have
equally votes. For they may likewise have a
freehold interest, as lord Coke has before ob-
served;

served; being generally either tenants for life, or in fee; in which cases it is held that they have *fee and freehold by custom*^a; or in other words, that the latter, *viz.* the copyholder in fee, hath a *customary estate of inheritance*^b: terms, that in their import are at least equivalent to the *customary freehold*, which our courts of law have sometimes applied to the estate of *villan-socmen*.

LET it farther be considered, that although at the making of these statutes of king Henry the sixth, and long before, a great part of the common copyholds of the kingdom were in the hands of freemen, and have been so entirely for about two centuries past, exclusive of villeins or bondmen^c; yet there is not a single instance in all this long period of time, wherein a mere copyholder at will has been allowed or has ever attempted, upon that footing, to give a vote for knights of the shire: which proves, that it is not freedom of *person*, nor yet a freehold *interest*, that will constitute a legal elector; unless it be also joined with that other constituent quality, the freedom of *lands*, which is indispensably requisite to form

^a Kitch. tit. copyhold,
^b 9 Rep. 75 b.

^c Smith's commonw. b. 3. c. 10.

the complete *frank tenement* of the voter for
knights of the shire.

FOR it is worthy observation, that the statute of 8 Hen. VI. is the principal statute that requires the landed qualification; the explanatory act of 10 Hen. VI. only requiring, that the freehold estate shall be within the same county for which the election is had. And the words of this statute of 8 Hen. VI. are that the voter “shall have free land or tenement.” Which mode of expression plainly shews, that it was not merely a freehold *interest*, or life estate, that was required in the electors; but that the *land* itself, and of course the tenements incorporeal thereout issuing, (as rents, &c,) should be free in point of *tenure*. A freehold interest was indeed required, as well as a freehold tenure; for so much is implied in the word “have;” since no one at common law was said to *have* or to be in possession of land, unless it were conveyed to him by the livery of seisin, which gave him the corporal investiture and bodily occupation thereof; and this ceremony of delivering seisin could not convey a less interest than for term of life. He therefore that enjoys an estate for years is not said to be possessed of the *land*, but only of his *term of years*. For as it is observed

served by St. Germain¹, “the possession of the land is, after the law of England, called ‘the franktenement or freehold;’” and Britton also defines franktenement in this sense to be “a possession of the land, or of services issuing out of land, which a freeman hold-eth in fee, to him and his heirs, or at least for term of life.”

SEEING then a freehold in point of tenure, as well as in point of interest, is required by the statute of Henry the sixth, it remains only to be shewn, that this tenure in villan-focage is not a freehold tenure; or that lands and tenements so holden are not free lands and tenements within the meaning of that statute.

AND here it might be fully sufficient to recur to Bracton’s division of tenements above cited, into *tenementa libera et villenagia*, and to observe that this is ranked among the *villenagia*, though it be *villenagium privilegiatum*. It might be sufficient to recollect, from him and the author of Fleta, that though the tenants themselves “dicuntur liberi, eo quod corpora sua sunt libera,” yet their tenements

¹ Dr. and Stud. d. 2. c. 22.

en fee, a lui, et a ses beires, ou au meyns

² Une possession de foil, ou de services issuantz de foil, que fraunk homme tient

a terme de vie. c. 32.

are

are held “*in villenagio, faciendo inde opera servilia, ratione tenementorum licet non ratione personarum;*” or, as Britton has expressed it, “*sunt fraunks de faunk, et tenant terre in villeinage.*” At the same time recollecting also that rule of Bracton¹, “that a freeman confers no enfranchisement on his villan-tenements, in respect of the freedom of his person.” It might be sufficient to remark that these are indisputably tenants by copy of court-roll, and therefore copyholders; and that lord Coke has just now told us, that “in one respect freeholders are opposed to copyholders; so that whatsoever is *not copyhold* is *freehold*.” And we might fairly conclude with observing, that three hundred years ago, when this statute was made, the villan services issuing out of these lands were not universally commuted for money, as at present, but were frequently performed in specie; which was so notorious a badge of servile tenure, that no sheriff could then have entertained a doubt, whether lands and tenements holden by such villan services, were free lands and tenements; and whether their owners should be ranked among “the people of smal substaunce and of no valour,”

¹. *Quod liber homo nibil libertatis, villenagio. l. 4. tr. 1. c. 9.*
propter personam suam liberam, confert

or should be esteemed "equivalent to the
"moste worthye knyghtes and esquyars."

BUT to put the matter still farther (if possible) out of doubt, it may be worth while to descend to particulars, and to shew from the several peculiar properties of their tenure, which we have before noted, that it is impossible that lands holden in villan-socage should be regarded as free lands and tenements even at this day, much less at the making of this statute.

1. BECAUSE the generality of them are found within such manors as were antient demesne; and where they are not so, since they resemble those of antient demesne in all other points, they must be liable to the same construction; there being no reason why the villan-socmen of private lords should be higher esteemed than those of the king himself. Now here it will be proper to remember an observation of chief justice Holt^u, "that tenants in antient de-
"mesne are free as to their *persons*, not as to
"their *estates*; for if antient demesne be to be
"tried, the issue is, whether antient demesne,
"or frank fee." This will be more fully in-
sisted on hereafter. In the mean time we may

^u Salk. 57.

observe

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observe, that the statute of 4 and 5 Will. and Mar. c. 24. jurors are directed to have “ten pounds by the year — of freehold, — or copyhold, — or antient demesne.” Which shews, that though they were not esteemed by the legislature (neither is it contended they are) upon a level with common copyholds, yet they were supposed to be in a middle, or third estate, and by no means equivalent to freeholds.

IT hath been before hinted, and must not be dissembled, that our law books and courts of law have frequently (especially of late years) distinguished these estates, in antient demesne and elsewhere, by the name of CUSTOMARY FREEHOLDS; and have laid it down that they cannot be copyholds, unless held at the will of the lord^x: and also that a freehold may be surrendered by custom in court, without the will of the lord; and that the alienee shall not be tenant at will, but shall have the inheritance^y. But in all these cases the terms “freehold and freeholder” are put in opposition to “common copyhold and copyholder,” to *unmere copyholder*, as Brook expresses it^z, or

^x Cro. Car. 229. 2 Ventr. 143. *tenant per copie.* 22. 9 Rep. 76. Co. Carthew. 432. Lord Raym. 1225. Litt. 59 b. 1 Roll. Abr. 562.

^y Fitzh. Abr. tit. *corone.* 310. *cus-*
tom. 12. Bro. Abr. tit. *custom.* 2. 17. ^z *Ten. per copie.* 22.

such

such as are sprung from the pure villenage of our antient tenures. For it would be absurd to say that lands, holden by copy, are not copyholds in *any* sense. The truth is, that these lands are of such an amphibious nature, that, when compared with mere copyholds, they may with sufficient propriety be called freeholds ; and, when compared with absolute freeholds, they may with equal, or greater propriety, be denominated copyholds. We do not contend that they are copyholds of base tenure, subject to *all* the servile badges of pure villenage ; but copyholds of a privileged tenure, retaining some badges of servility and not others ; or rather, (negatively) that they are not, purely and absolutely, freeholds. Whereas the question in all the adjudged cases above-cited has been, whether *common* copyhold or not ; and it has been very justly determined that this species of lands is not common copyhold : but it does not therefore follow that it is purely and simply freehold ; being on the contrary usually distinguished into a third intermediate state, under the mixed and complicated denominations of customary freehold, free copyhold, or as lord Coke expresses it^a, copyhold of frank tenure.

^a Copyh. §. 32.

IT perhaps may be also objected, that lord Coke (in the passage just cited) declares that in these copyholds of franktenure, the *freehold* resteth in the tenant and not in the lord. But this word “*freehold*” must there be understood to denote the *interest*, and not the *tenure* of the land. And this depends upon a nicety in the modern law, derived from a very substantial and solid reason in the old law. When lands were in fact held in pure villenage, the tenant was really tenant at the lord’s will, and therefore the law did not allow him to have the *freehold* of the land, but declared it to remain in the lord; for tenant at will hath hardly any interest at all, much less a *freehold* interest. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate for life or in fee, but yet continued to be styled in their copies tenants at the will of the lord; (the omission of which, in their state of villenage, would have been a manumission of their persons^b) the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any *freehold* interest; and therefore continued, and still continues, to determine, that the free-

^b Mirr. c. 2. §. 28. Litt. §. 204, 5, 6.

hold of lands so holden abides in the lord of the manor; and not in the tenant, though he *really holds* to him and his heirs for ever, since he is also *said to hold* at another's will. But as to these copyholders of free or privileged tenure, the case is otherwise. They do not, nor ever did, hold at the lord's will; either in fact, or nominally. There is therefore no absurdity in allowing them capable of enjoying a freehold interest; and on that account the law doth not suppose the freehold of these lands to rest in the lord of whom they are holden, but in the tenants themselves. Bracton indeed makes a distinction^c between *native* villan-socmen, who are born within antient demesne; and such as are *adventitious*, who hold by compact and convention with the lord; apprehending that, though the latter may have a freehold interest, the former cannot. "Compact and the consent of the lord may make the latter's estate a freehold;" and again; "in the person of one it shall be freehold, in the person of the other villenage." And yet, granting their *interest* to be freehold, it does not follow that their *tenure* is free; for their services, though

^c *Conventio et consensus dominorum et in persona alterius villenagium.* l. 2.
faciet ei liberum tenementum: and again; c. 8. §. 2.
in persona unius erit liberum tenementum,

certain, were not free but villan services ; and therefore Bracton in the same section declares^d, that “although the service be certain “from a villan socage, yet the tenant shall “not therefore have a freehold.”

THE testimony of Mr. Selden to the same purpose is too decisive to be here omitted; who tells us^e that this matter received a solemn judicial determination in the reign of king Edward the first; when the court, after repeated arguments, adjudged these tenants in antient demesne to be by no means free tenants. “To add a word, for once, not foreign “to the purpose, concerning this appellation “of freeman. The old law of England “honoured only those with that name, who “(whether of illustrious ancestry, or the best “born among the people) were not tenants of “those rustic estates, sacred to Stercutius, and “necessarily burthened with the plowtail, the

^d *Quamvis de villano socagio fiat certum servitium, propter hoc non habebit liberum tenementum.* *Ibid.*

^e *Ut semel de libero homine quid non abs re adferam. Eos duntaxat primum Angliae jus isto dignatum est nomine, quotquot (sive avorum imaginibus clari, sive e plebe ingenui) feudum illud rusticum non possidebant, Stercuto dicatum; atque buri, plaustro, traheo, quae duris agrestibus armis, necessario onussum.* —

Ut liquidius res adseratur, contestata sub Edw. I. lite, inter Iohannem Levinum actorem, et priorem Bernwellensem reum, (vetusto e ms. codice depropensi, et concordes juris nostri annales, regiorumque scriptorum syntagma) feudatarios ab antiquo, quod aiunt, dominico coronae liberiorum hominum voce, post reciprocatas et satis intensas altercationes, minime comprehensos fori judicio est definitum. Jan. Ang. l. 2. §. 97.

“ wain,

"wain, the dungcart, and other the rude im-
"plements of husbandry. To make the mat-
"ter evident; in an action that was brought
"in the reign of Edward the first, between
"John Levin plaintiff and the prior of Bern-
"well defendant, (I took it from an antient
"manuscript, which is confirmed by our
"year books, and the register) after much
"learned argument on both sides, it was fi-
"nally held by the court, that the tenants in
"antient demesne were by no means compre-
"hended within the appellation of *freemen.*"

2. A SECOND argument, to shew that these tenures in villan-focage are not free tenures, will arise from their method of transfer or alienation, which was before remarked; namely, by surrender into the hands of the lord, and not by the usual conveyances by deed at the common law. Of these feoffment with livery of seisin is still the principal, and was the only original conveyance by which a freehold could pass, till the statute of uses in the reign of Henry the eighth. Hence Littleton says ^f, that "where a freehold shall pass it behoveth "to have livery of seisin." And the inability of these tenants to convey by livery, but only by surrender into the hands of the lord, Brac-

ton deduces from their want of freehold, as well in the place before cited^g, as also in the following^h: “If any villan socman would convey his villan socage to another, he must first surrender it to the lord, or his servant if the lord be not present; and from their hands the transfer shall be made to the other, to hold freely, or in socage, as the lord shall please: because such villan socman hath not the power of alienation, since he hath not in himself the freehold, but it rests in the lord.”

3. ANOTHER argument, to shew that tenants in villan-socage are not free tenants, may be drawn from their inability to sue or be sued for their lands, or of course to levy a fine or suffer a recovery in the king’s courts of common law; but only in the court baron of the lord, by the peculiar writ of right close. “*Non jacet assisa, &c, quia ibi non est liberum tenementum; sed loco omnium accipitur parvum breve, &cⁱ.*” This little writ of right close may be found in the old register of

^g l. 4. tr. 1. c. 28.

^h Si autem villanus socmannus villanum socagium ad alium transferre voluerit, prius illud restituat domino, vel servienti si dominus praesens non fuerit; et de manibus ipsorum fiat translatio ad alium, tenendum libere, vel in socagio,

secundum quod domino placuerit: quia

ille villanus socmannus non habet potestatem transferendi, cum liberum tenementum non habeat, sed dominus. l. 2. c. 8. §. 3.

ⁱ Bracton, ubi supra, l. 4. tr. 3 c. 13. §. 5.

writs^k;

writs^k; and it is worthy of observation, that the rule or rubric therein prefixed to this writ expressly declares that no freeman can have the use of it. “It must be observed that the “little writ of right lieth in all cases for sok-“men which are of the king’s antient demesne; “for no sokman can implead another sokman “of land or tenement by any other writ than “the little writ of right which follows. And “in this writ it shall not be said, *quod clamat* “*tenere de te per liberum servitium;*” (as in writs of right patent of free lands^l) “because “that *no freeman* shall bring this writ.” This freedom must be understood of the tenure of his land, for that is the only thing which the writ relates to; being the remedy allotted to recover lands in villan-focage, as the several possessory actions, by writ of entry and assise, and in fine the great writ of right patent, were ordained for the recovery of free lands or such as were *frank fee*. For *frank fee* is defined in the old tenures^m to be land pleadable at the common law; whereas it is said of villan-focage, there calledⁿ, and also in the old

^k Fait assayvoir que le petit briefe de [quod clamat tenere de te per liberum droyt gyft toutdis pour sokmans que sont servitium] purceo que null franke bome del auncien demesne le roi; quar nul portera cest briefe. fol. 9.
sokman poet empleder auter sokman de terre, ne de tenement, per auter briefe que per petit briefe de droyt, quod sequitur. Et en cest briefe ne serra pas dit

^l Registr. Brev. 1.

^m tit. tenir en *frank fee*.

ⁿ tit. tenir en *focage*.

Natura Brevium^o, socage of antient tenure, that no writ runs thereof “*forsque le petit briefe de droit clos, que est appell secundum consuetudinem manerii.*” And hence it is that the old Natura Brevium^p, and Fitzherbert^q lay it down, that “a fine levied “or recovery had of lands in the *king's court* “proves them to be frank fee;” as on the other hand, a recovery had of them in the *lord's court* proves them not to be frank fee. For by the statutes of 15 Ric. II. c. 12. and 16 Ric. II. c. 2. it is enacted, “that none of the kynge's “subjectes be compelled, neither by no way “constrained to come, ne to apere before the “counsell of any lorde or ladie, to answere for “his freholde, ne for any thyng touchinge “his frehold, nor for any other thynge reall “nor personal, that belongethe to the lawe of “the lande in anye maner.” Which word *counsell* signifies in its legal sence the court of those lords or ladies; in like manner as in the statute of *praemunire* in the same session, 16 Ric. II. c. 5. where the offenders are ordered to be “brought before the kynge and his counsell,” by the king's *counsell* there is always understood his court of justice.

^o tit. garde.^p tit. briefe de recto clauso,^q Nat. Brev. 13.

AND as this peculiar method of recovery, by a writ of *right close* in the lord's court, (which is mentioned by Mr. Kitchen, above cited^r, as belonging to all this species of tenants, whether *in* or *out* of antient demesne;) as this process, I say, proves the lands not to be frank fee or free lands; so it also distinguishes them from mere copyholds at the will of the lord; which are not impleadable by this writ, but only by bill or plaint^s. Which therefore shews this tenure to be of the amphibious nature we have before described; not a mere copyhold on the one hand, but by no means frank fee on the other.

4. A FOURTH argument, to prove that this tenure cannot be a free tenure, is this; that though the lands be not held at the will of the lord, and therefore the tenant cannot, nor ever could, be ousted at the lord's pleasure, as was formerly the case in common copyholds; yet still the lands are liable to forfeiture, and the tenant may be ousted by his own default, for the nonpayment and non-performance of his rents and services: which

^r tit. copyhold,

^s eod. tit. 7. tit. auncien demesne. 45.

Stath. Abr. tit. faux judgment. 5. Fitz. n. b. 12.

Fitz. Abr. ed. tit. 5. Bro. Abr.

no free tenant, *per liberum servitium*, could be by the common law. For the writ of *cessavit*, (by which lands may now be recovered against a freeholder, for such default for two years together) was first given by the statute of Gloucester, 6 Ed. I; before which the lords had no remedy, but that of distress, for subtraction of freehold services: and at present, this writ of *cessavit* may be defeated, even pending the suit, by tender of amends to the lord. But it is the very condition of the tenure in question, that the lands be holden only so long as the stipulated service is performed; "*quamdiu velint et possint facere debitum servitium, et solvere debitas pensiones;*" as is the doctrine of Bracton, Britton, and the rest, above cited. So too the lord may seize their lands for alienation contrary to the custom^t; and it is not improbable that he has likewise the power of seizing, if the heir comes not in to be admitted in court at the death of the ancestor, and for other causes, according to the peculiar customs of each respective manor. Now it is impossible that tenants thus dependant on their lords, who may by law take the advantage of sudden forfeitures, and destroy their estates, can or ever could be ranked in the same class with absolute freeholders,

^t Bro. Abr. t. *custom.* 17.

whose

whose estates are not liable to be defeated upon any such servile conditions.

5. A FIFTH argument to shew that these tenants are not freehold tenants, at least with regard to elections of the knights of the shire, is not only that they are not members of the county court, where all elections by freeholders are directed to be made ; “*non sectas faciunt ad comitatum*” ; but also because they did not contribute to the wages of the knights of the shire, which were formerly raised by their constituents to defray their expenses in parliament ; and for levying of which there is a writ in the register *. Now the tenants in antient demesne (which compose much the greatest part of those who hold by the tenure before us) were exempted from contributing to these expenses *. This must not be carried so far as some have carried it, who insist that all tenants by copy were exempted from this contribution ; since it seems to have been raised upon all villeins, as well as freemen, except villeins of antient demesne and such as belonged to the lords of parliament. For the possession and goods of the villein were looked upon as the possession

^u Fleta, *ubi supr. l. i. c. 8. §. 2.*

^x Fitz. *n. b. 228 c.*

^w fol. 191.

and

and goods of the lord ; and if the lord did not go to parliament himself, it was reasonable that his estate (by whomsoever held) should bear a proportion of those charges : but if he attended in person, it was then equally reasonable that his estate and tenants should be excused. And therefore we have writs in the register^y, not only to exonerate tenants in antient demesne, but also to exonerate the *nativi* or villeins of such lords who personally attended the parliament. — “ Because it is not agreeable to law, that the villeins of the said A. who was personally present at our parliament aforesaid by our command, should contribute to the expenses of the knights aforesaid : especially as the goods of the said villeins are the property of the said A.” But thus much may be certainly shewn, and it is sufficient for the present argument, that after the statutes of Henry the sixth, so long as the custom continued of levying the knight’s wages, no person who was not contributory to their wages, was admitted to vote for their election. Tenants in antient demesne were therefore clearly excluded from voting ; and, if they were

^y Quia non est juri consonum, quod
nativi praedicti episcopi, [Cestrensis]
qui parlimendo nostro praedicto persona-
liter interfuit de mandato nostro, expensis

contribuant militum praedictorum : pae-
sertim cum bona ipsorum nativorum sint
propria bona dicti episcopi. fol. 261.

excluded

excluded, it is not probable that those whose tenures were framed in imitation of theirs, should be admitted to this privilege. However it is allowed, that this argument, as far as it relates to the wages, does not so certainly conclude against other villan-socmen, as villan-socmen in antient demesne; though the not being amesnable to the county court, as well as the arguments before alleged, conclude equally against them all.

THAT no person was admitted to vote, but such as were thus contributory, appears from Dalton^a, who is express, that “the freeholders intended by the statutes of Henry the sixth, must be such freeholders as do contribute to the wages of the knights of the shire, or else such as are suitors to the county court.” Mr. Lambard likewise^b says, “it is known, that they of antient demesne do prescribe in not sending to parliament; for which reason also they are not contributors to the wages of the knights there.” And Nathaniel Bacon^c assigns it as a principal reason for making those statutes, “that those men only should have votes, in election of the common council of the

^a Of sheriffs. 418.

^b English governm. p. 2. c. 14.

^c Archeion. 258.

“ kingdom,

" kingdom, whose estates were chargeable
 " with the publick taxes and assessments, and
 " with the wages of those persons that are
 " chosen for the public service." Wherefore
 also it is expressly complained of in a petition
 to the king from the freeholders of Hunting-
 donshire, 29 Hen. VI. that the sheriff had
 admitted and sworn forty seven persons to poll
 for knights of the shire, " few of them con-
 " tributors to the knights expenses ." The
 sheriff it is true did not think proper to return
 the person so polled for, and therefore no
 formal determination was had in this matter.
 But it seems to have been then looked up-
 on as a notorious piece of presumption ; and
 thence, as well as upon the reason of the
 thing, Mr. Prynne concludes ^a, that " none
 " but contributaries to the knights expenses
 " should have any voices in the election of
 " knights of the shire for parliament." And
 upon the same ground an argument is also
 drawn in the yearbook ^b, that men of antient
 demesne are not privies to the making of acts
 of parliament, because (says the book) they
 shall not be contributors to the expenses of
 the knights and burgesses. From the whole
 of which authorities it appears that lord chief

^a Prynne's parl. writs. iii. 159.^a Ibid. iv. 605.^b P. 7 Henr. VI. 35. in Fitz. Abr.
tit. Jurisdiction. 4.

baron Gilbert upon this, as well as other accounts, was sufficiently warranted to assert^f, that “antient demesne tenants (whom he styles^g tenants in villenage, and tenants in “villan-focage) had no representatives in parliament, being never esteemed freemen.”

6. THE last argument that shall be offered upon this head is a very concise one, and is this; that, however the lawyers may at times have denominated these tenures a sort of base species of freehold, in contradistinction to mere copyholds, yet the law in the main regards them as being properly COPYHOLD and not FREEHOLD tenures; else they could not have subsisted to this day. For they must otherwise have been involved in the general fate of the rest of our antient tenures, when by the statute of 12 Car. II. c.24. they all were abolished and reduced to free and common socage; — except only tenures in *frank almoign*, and tenures by copy of court roll. Free and common socage these tenures cannot be; their surrenders, and admittances, their frequent fines for alienation, and peculiar paths of descent, (from which two last, as not being their universal properties, no argument hath been hitherto drawn) their forfeitures, recoveries,

^f Hist. of the exchequer, pag. 30.

^g pag. 19 and 27.

and

and privileges, (still regulated by particular custom in derogation of the common law) most clearly evince the contrary. Nor will it be pretended that they are of the nature of *frank almoign*. There remains therefore no other choice; tenures by copy of court roll they must be. This is their indelible character: it is to this they owe their present existence, and survival of other tenures. The statute has reduced all manner of lay **FREEHOLDS** to one and the same level, of free and common socage: but **COPYHOLDS** remain as they were; as various, as singular, and as servile in their tenure as ever. These tenures therefore not being free and common socage, must necessarily remain **COPYHOLDS**, as entirely as in the time of Bracton; of a superior order indeed, and distinguished by some advantages (formerly real, now nominal only) over the baser sort; but still far short of the dignity, the immunities, and the independence of that **FREEHOLD** tenure, which for more than three hundred years has constituted an elector of knights of the shire to serve in the **ENGLISH PARLIAMENT**.

P O S T S C R I P T.

THE doctrine above contended for is now established by the following act of parliament, which was made soon after the first publication of the foregoing tract, in order to prevent ALL tenants by copy of court roll from attempting to vote at elections for knights of the shire.

101 2011 W 1962
294 Oct 2000

the following day. I had been to
the beach and had been swimming in
the ocean. I was feeling very tired and
had just come home from the beach. I
was sitting on my bed and reading a book.
I was feeling very tired and wanted to go to
bed.

102

Anno tricesimo primo

Georgii II. Regis.

An Act for further explaining the
Laws touching the Electors of
Knights of the Shire to serve in
Parliament for that Part of *Great
Britain* called *England*.

WHEREAS by an Act made in Preamble.
the Eighteenth Year of the Reign
of his present Majesty, intituled, An Act
to explain and amend the Laws touching
the Elections of Knights of the Shire to
serve in Parliament for that Part of *Great
Britain* called *England*; it is enacted,
That no person shall Vote at the Election
of any Knight or Knights of a Shire
within that Part of Great Britain called

L 2 England,

England, or Principality of Wales, without having a Freehold Estate in the County for which he Votes, of the clear yearly Value of Forty Shillings, over and above all Rents and Charges payable out of or in respect of the same: And whereas, notwithstanding the said Act, certain Persons who hold their Estates by Copy of Court Roll, pretend to have a Right to Vote, and have, at certain Times, taken upon them to Vote at such Elections; be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the Twenty fourth Day of June, One Thousand seven Hundred and fifty eight, no Person, who holds his Estate by Copy of Court Roll, shall be intitled thereby to Vote at the Election of any Knight or Knights of a Shire within that Part of Great Britain called England, or Principality of Wales: and if any Person shall Vote in any such Election, contrary to the true Intent and Meaning hereof, every such Vote shall be void to all Intents and Purposes whatsoever; and every Person so Voting shall forfeit to

No Copy
holder shall
vote for
Knights of the
Shire;

their Votes
void, and they
to forfeit 50/-.

to any Candidate for whom such Vote shall not have been given, and who shall first sue for the same, the Sum of Fifty Pounds to be recovered by him or them, his, her, or their Executors and Administrators, together with full Costs of Suit, by Action of Debt in any of his Majesty's Courts of Record at Westminster, where in no Essoin, Protection, Wager of Law, Privilege, or Imparllance, shall be admitted or allowed; and in every such Action the Proof shall lie on the Person against whom such Action shall be brought.

And be it further enacted by the Authority aforesaid, That it shall and may be sufficient for the Plaintiff in any such Action of Debt to set forth in the Declaration or Bill, that the Defendant is indebted to him in the Sum of Fifty Pounds, and to alledge the Offence for which the Action or Suit is brought, and that the Defendant hath acted contrary to this Act, without mentioning the Writ of Summons to Parliament, or the Return thereof; and upon Trial of any Issue in any such Action or Suit, the Plaintiff shall not be obliged to prove the Writ of Summons to Parliament, or the Return thereof, or any Warrant or Authority

with full Costs
of Suit.

Plaintiff's De-
claration in the
Action of
Debt.

Authority to the Sheriff grounded upon
any such Writ of Summons.

Limitation of
Actions.

Provided always, That every such Action or Suit shall be commenced within the Space of Nine Calendar Months next after the Fact, upon which the same is grounded, shall have been committed.

Statutes of
Jeofails, &c.
extended to
such Suits.

And be it further enacted by the Authority aforesaid, That all the Statutes of Jeofails, and Amendments of the Law whatsoever, shall and may be construed to extend to all Proceedings in any such Action or Suit.

Plaintiff Non-
suited &c. to
pay Treble
Costs.

Provided always, and be it further enacted by the Authority aforesaid, That in case the Plaintiff in any such Action or Suit, shall discontinue the same, or be Nonsuited, or Judgment be otherwise given against him, then, and in any of the said Cases, the Defendant, against whom such Action or Suit shall have been brought, shall recover his Treble Costs.

A

T R E A T I S E .

O N T H E

L A W O F D E S C E N T S

I N F E E - S I M P L E .

BUCHANAN

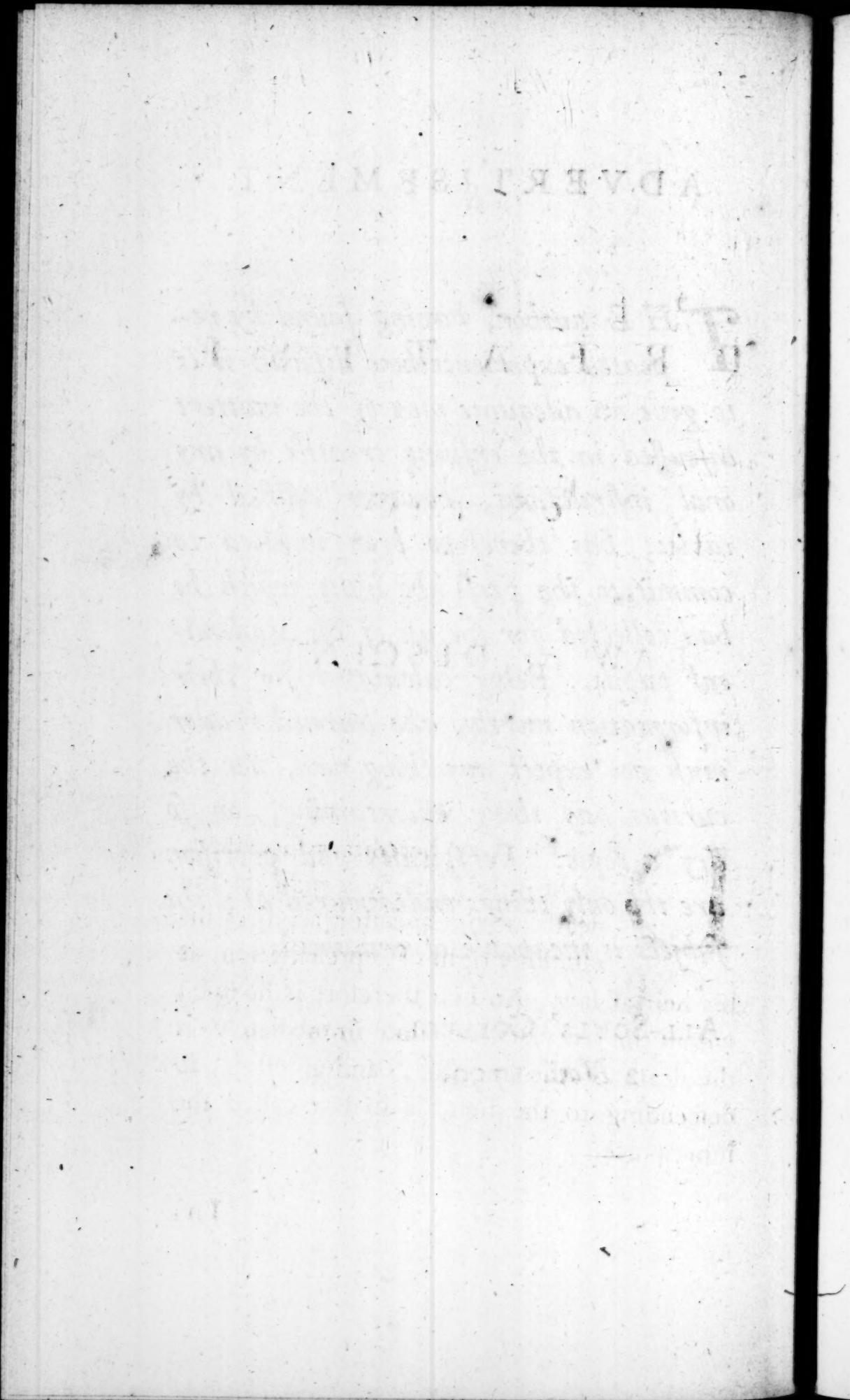
BURGESS YARD

ADVERTISEMENT.

*T*H E author, having found by repeated experience how difficult it is to give an adequate idea of the matters discussed in the ensuing treatise by any oral instructions, however assisted by tables, has therefore been induced to commit to the press the hints which he had collected for the use of his academic pupils. Being calculated for their information merely, the learned reader must not expect any thing new, nor the curious any thing entertaining, on so dry a topic. Perspicuity and precision are the only things endeavoured at: the subject is incapable of ornament.

ALL-SOULS' COLLEGE,

2 Nov. 1759.



A
T R E A T I S E
ON THE
LAW OF DESCENTS.

DESCENT, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

THE

THE doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance, and is indeed the principal civil object of the laws of England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive, that this is an estate confined in it's descent to such heirs only of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; this is a point, that we must resort back to the standing law of descents in fee-simple to be informed of.

IN order therefore to treat a matter of this universal consequence the more clearly, I shall first endeavour to point out who is the legal heir,

heir, in all possible circumstances that can occur, provided there is no special impediment to obstruct his title; which will include the whole doctrine of the law of DESCENTS: and shall afterwards consider the special impediments that may divert or totally destroy the general course of inheritance; which will bring under our consideration the doctrine of the law of ESCHEATS, as a kind of appendix to the former.

BUT, as both of these doctrines depend not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood ^a.

CONSANGUINITY, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium*," the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

^a For a fuller explanation of the doctrine of consanguinity, and the consequences resulting from a right apprehension of its nature, see the essay on collateral consanguinity, in the beginning of this volume.

LINEAL consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other; as between John Stiles (the *propositus* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandf^re 2nd grandson in the second; his great-grandf^re, and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil ^b, and canon ^c, as in the common law ^d.

T H E doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees. He

^b *Ff.* 38. 10. 10.

^c *Decretal.* l. 4. tit. 14.

^d *Co. Litt.* 23 b.

has two in the first ascending degree, his parents; he has four in the second, the parents of his father and the parents of his mother; he has eight in the third, the parents of his two grandfathers and two grandmothers; and, by the same rule of progression, he has an hundred and twenty eight in the seventh, a thousand and twenty four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man has above a million of ancestors^e, as common arithmetic will demonstrate. And as many ancestors as a man has, so many different bloods is he said to contain in his veins^f. This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum personarum ab eodem stipite descendentium*; since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

COLLATERAL kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor, but differing in this, that they do not descend from each other. Collateral kinsmen as such then as lineally

^e 1048576.^f Co. Litt. 12 b.

spring from one and the same ancestor, who is the *stirps*, or root, the trunk, the *stipes*, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*.

WE must be careful to remember, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related; why? because both are derived from one father: *Titius* and his first cousin are related; why? because both descend from the same grandfather: and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by holy writ, that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is descended, the obvious and undeniable

con-

consequence is, that all men are in some degree related to each other.

THE method of computing these degrees in the canon law^s, which our law has adopted^t, is as follows. We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. As, in case of *Titius* and his brother, they are related in the first degree; for from the father to each of them is counted only one: *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor, his own grandfather, the father of *Titius*. Or, (to give a more illustrious instance from our English annals) king Henry the seventh, who slew Richard the third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus* therefore in the table of consanguinity represent king Richard the third, and the class marked (e) king Henry the seventh. Now their common stock or ancestor was king Edward the third, the *abavus* in the same table: from him to Edmond duke of York, the *pro-*

^s *Decretal.* 4. 14. 3 &c. 9.

^t *Co. Litt.* 23 b.

avus, is one degree; to Richard earl of Cambridge, the *avus*, two; to Richard duke of York, the *pater*, three; to king Richard the third, the *propositus*, four: and from king Edward the third to John of Gant is one degree; to John earl of Somerset, two; to John duke of Somerset, three; to Margaret countess of Richmond, four; to king Henry the seventh, five. Which last mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians, (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other; reckoning a degree for each person both ascending and descending) these two princes were related in the ninth degree: for from king Richard the third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York, three; to king Edward the third, the common ancestor, four; to John of Gant, five; to John earl of Somerset, six; to John duke of Somerset, seven; to Margaret countess of Richmond, eight; to king Henry the seventh, nineⁱ.

ⁱ See the table of consanguinity in pag. 10; wherein all the degrees of collateral kindred to the *propositus* are computed, so far as the tenth of the civilians

and the seventh of the canonists inclusive; the former being distinguished by the numeral letters, the latter by the common ciphers.

THE nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules, or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

THE first rule is, that

I.

Inheritances shall lineally descend to the issue of the person last actually seized, *in infinitum*; but shall never lineally ascend.

To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est haeres viventis.* Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive.

M 2

Heirs

Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heirs to the father whenever he happens to die. Heirs presumptive are such, who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases the estate shall be devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son.

We must also remember, that no person can be properly such an ancestor, as that an inheritance in lands or tenements can be derived from him, unless he hath had actual seisin of such lands, or what is equivalent thereto in incorporeal hereditaments; and not he who hath had only a bare right or title to enter

enter or be otherwise seised. And therefore all the cases, which will be mentioned in the ensuing treatise, are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. So that the seisin of any person makes him the root or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *Seisina facit stipitem*^k.

WHEN therefore a person dies so seised, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases land and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey, to whom the land shall never ascend, but shall rather escheat to the lord^l.

THIS rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that the possessions of the parents should go, upon their

^k Flet. l. 6. c. 2. §. 2.

^l Litt. §. 3.

decease,

decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother ^m. And, by the laws of Rome, in the first place the children or lineal descendants were preferred ; and, on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sistersⁿ; though by the law of the twelve tables the mother was originally, on account of her sex, excluded ^o. Hence this rule of our laws has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice ^p. Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good reason, may appear from considering as well the rule itself, as the occasion of introducing it into our laws.

^m Selden. *de success.* Ebracor. c.12. ^p Craig. *de jur. feud.* l. 2, t. 13.

ⁿ Ff. 38. 15. 1. Nov. 118, 127. §. 15. Locke on gov. part 1. §. 90.

^o Inst. 3. 3. 1.

WE are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor; after which the land by the law of nature would again become common, and liable to be seized by the next occupant: but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued, and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law. Nor is the admission of parents to the inheritance of their children so fully dictated by natural reason, as the admission of children most certainly is to that of their parents, where any succession is permitted: for, as the progenitors received not their being from their offspring, they have therefore less reason to expect from that quarter the means of support and subsistence.

IT

IT may farther be alleged in defence of this exclusion, that those who introduced and gave a sanction to this law were themselves fathers; and, considering them as such, this establishment conveys to us a very high idea of their magnanimity, honour, and parental affection⁴. Of their magnanimity: because a gift of lands from the parents to the children is so much the more generous and conveyed with the better grace, the farther the distance is, at which they have placed the possibility of a resumption, or of the inheritance's returning to themselves. Of their honour: which was too delicate to admit their children upon such a footing of equality, as that they might be mutually heirs to each other; or even to entrust themselves with the maintenance and care of that offspring, by whose death they might possibly be gainers. Of their parental affection: in that they regarded the loss of their children as the greatest misfortune that could possibly befall them, for which no estate could be a recompense: they would not therefore anticipate their affliction, by supposing a thing so contrary to nature as that the parent should outlive the child; nor make provisions in their own favour in consequence.

⁴ Robinson's law of inheritances, 2d edit. p. 51, &c,

of so melancholy a contingency, which even those laws that allow the ascent of inheritances have denominated *tristis et luctuosa successio*¹. These reasons, drawn from the consideration of the rule itself, seem to be more satisfactory than that quaint one of Bracton², adopted by sir Edward Coke³, which regulates the descent of lands according to the laws of gravitation.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures. For it was an express rule of the feudal law⁴, that *successionis feudi talis est natura, quod ascendentes non succedunt*; and therefore the same maxim obtains also in the French law to this day⁵. Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line⁶: but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the second, we find it laid

¹ Inst. 3. 3. 2. C. 6. 25. 9.

² 2 Feud. 50.

³ 1. 2. c. 29. *Descendit itaque jus, quasi ponderosum quid, cadens deorsum recta linea, et nunquam reascendit.* ^w Domat. p. 2. l. 2. t. 2. Montesqu. Esp. L. 1. 32. c. 33.

⁴ 1 Inst. 11.

^x LL. Hen. I. c. 70.

down

down as established law', that *haereditas nunquam ascendit*; which has remained an inviolable maxim ever since. These circumstances evidently shew this rule to be of feodal original; and, taken in that light, there are some arguments in it's favour, besides those which are drawn from the reason of the thing. For if the feud, of which the son died seised, was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feodal constitutions^z; which was founded as well upon the personal merit of the vasal, which might be transmitted to his children but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vasal would be but indifferently qualified to succeed him in his feodal services. Nay, even

if this *feudum novum* were held by the son *ut* *feudum antiquum*, or with all the qualities annexed of a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an antient feud; and therefore could not go to the father, because, if it had been an antient feud, the father must have been dead before it could have come to the son. Thus whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed.

A SECOND general rule or canon is, that,

III.

The male issue shall be admitted before the female.

Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred^a. As if John Stiles hath two sons, Matthew and Gilbert, and two daughters Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be ad-

^a Hal. H.C.L. 235.

mitted

MITTED TO THE SUCCESSION IN PREFERENCE TO BOTH
THE DAUGHTERS.

THIS preference of males to females is entirely agreeable to the law of succession among the Jews^b, and also among the states of Greece, or at least among the Athenians^c; but was totally unknown to the laws of Rome^d, (such of them, I mean, as are at present extant) wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the Roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex; but shall only observe, that our present preference of males to females seems to have arisen entirely from the feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males^e, yet our subsequent Danish predecessors seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance^f. But the feudal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of

^b Numb. c. 27.

^c Petit. *LL. Attic.* l. 6. t. 6.

^d *Inst.* 3. i. 6.

^e *Stat. Wall.* 12. *Edw.* I.

^f *LL. Canut.* c. 68.

king Canute) gives an evident preference of the male to the female sex. "Pater autem, defuncti, filio non filiae haereditatem relinquunt. . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis haereditas pertinet!" It is possible therefore that this preference might be a branch of that imperfect system of feuds, which obtained here before the conquest; especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king Henry the first, it is not (like many Norman innovations) given up, but rather enforced. The true reason of preferring the males must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained; it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations: our law, like that of the Saxon feudists before-mentioned, thus steer-

ing a middle course, between the absolute re-jection of females, and the putting them on a footing with males.

A THIRD rule, or canon of descent, is this; that

III.

Where there are two or more males in equal degree, the eldest only shall inherit; but the females all together.

As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew his eldest son shall alone succeed to his estate, in exclusion of Gilbert the second son and both the daughters: but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners^k.

THIS right of primogeniture in males seems anciently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance^l; in the

^k Litt. §. 5. Hale, H.C.L. 238.

^l Selden, *de succ. Ebr.* c. 5.

same

same manner as with us, by the laws of king Henry the first^m, the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenaryⁿ. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible^o, or (as they stiled them) *feuda individua*, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the busi-

^m c. 70.

Glanvil. l. 7. c. 3.

^o 2 Feud. 55.

ness

ness and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments^p. These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feudal constitution was established in England by William the conqueror.

YET we find, that socage estates frequently descended to all the sons equally, so lately as when Glanvil^q wrote, in the reign of Henry the second; and it is mentioned in the mirror^r as a part of our antient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However in Henry the third's time we find by Bracton^s that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands: except in Kent, where they gloried in the preservation of their antient gavelkind tenure, of which a principal branch was the joint inheritance

^p Hale. H. C. L. 221.

^q I. 7. c. 3.

^r c. 1. §. 3.

^s I. 2. c. 30, 31.

of all the sons^t; and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other unusual methods of succession.

As to the females, they are still left as they were by the antient law: for they were all equally incapable of performing any personal service; and therefore, one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest: and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown^u; wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the king

^t Somner. Gavelk. 7.

^u Co. Litt. 165.

shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases^w. In which disposition is preserved a strong trace of the antient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper: — “*pro-
gressum est, ut ad filios deveniret, in quem
scilicet dominus hoc vellet beneficium confir-
mare*”.

A FOURTH rule, or canon of descents, is this; that

IV.

The lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*^y. And these representatives

^w Co. Litt. 165.^a

^x 1 Feud. 1.

^y Hale. H.C.L. 236, 237.

shall

shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles the father of the two sisters dies, without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one apiece.

THIS taking by representation is called a succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed²; but the Roman somewhat differed from it. They allowed the right of representation, but distinguished and refined upon that right. If any persons of equal degree with the persons represented were still subsisting, then the inheritance still descended *in stirpes*: as if one of three daughters died, leaving ten children, and then the father died;

² Selden. *de fact. Ebr.* c. 1.

the two surviving daughters had each one third of his effects, and the ten grandchildren had the remaining third divided between them, as representatives of their mother deceased. But if all the persons, related to the deceased in the first degree, were dead leaving issue, then their representatives in equal degree became themselves principals, and shared the inheritance *per capita*, that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation. As if there be three sisters, the only children of *Titius*, and they all die in the life time of *Titius*, one sister leaving three daughters, another two, and the third one only; the grandfather's inheritance by the Roman law was divided into six parts, and one given to each of these six grandchildren^a: whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus; one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

THIS mode of representation is a necessary consequence of the double preference given by

our law, first to the male issue, and next to the firstborn among the males, to both which the Roman law is a stranger. For if all the children of three daughters were in England to claim *per capita*, in their own rights as next of kin to the grandfather, without any respect to the stocks from whence they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the firstborn, among persons in equal degree. Whereas, by dividing the inheritance according to the roots or *stirpes*, the rule of descent is kept uniform and steady: the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As if

a man

a man hath two sons, A and B, and A dies leaving two sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estate: and if A had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B and his issue. But if a man hath only three daughters, C, D, and E; and C dies leaving two sons, D leaving two daughters, and E leaving a daughter and a son who is younger than his sister: here, when the grandfather dies, the eldest son of C shall succeed to one third, in exclusion of the younger; the two daughters of D to another third in partnership; and the son of E to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum.*

YET this right does not appear to have been thoroughly established in the time of Henry the second, when Glanvil wrote; and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother, and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of their common ancestor; for the uncle is certainly nearer

nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief; and besides had frequently superior interest and strength, to back his pretensions and crush the right of his nephew. Yet Glanvil, in this case^b, seems to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, (or as the civil law would call it) had not been forisfamiliated, in his lifetime. King John, however, who kept his nephew Arthur from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm^c: but in the time of his son, king Henry the third, we find the rule indisputably settled in the manner we have here laid it down^d, and so it has continued ever since. And thus much for lineal descents.

A FIFTH rule is, that,

^b *I. 7. c. 3.*

^c Hale, *H.C.L.* 217, 229.

^d *Braffon. I. 2. c. 30. §. 2.*

V.

On failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to the blood of the first purchaser; subject to the three preceding rules.

Thus if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey the first purchaser of this family^c. The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale, or by gift, or by any other method; except only that of descent. The feudists frequently stile him *conquistor* or *conquaestor*, and the Norman writers *conquereur*^d: which, by the way, was the appellation assumed by William the Norman, to signify that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived; though now from our dif-

^c Co. Litt. 12.

^d Gr. *Coufum. Glof. c. 25. fol. 40 b.*
use

use of the feudal sense of the word, together with the reflexion on his forcible method of acquisition, we are apt to annex the idea of victory to this name of *conquaestor* or conqueror.

THIS is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seised of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy^s agrees with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feudal original; and this rule or canon cannot otherwise be accounted for than by recurring to feudal principles.

WHEN feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to a feud, that he should be of the blood of, that is lineally descended from, the first feudatory or purchasor. In consequence whereof, if a vasal died possess-

^s *Gr. Conflum. c. 25.*

ed of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vasal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule; “*Frater fratri sine legitimo baerede defuncto, in beneficio quod eorum patris fuit, succedat: si autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo baerede, frater ejus in feudum non succedit*”^b. The true feudal reason for which rule was this; that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled) so in the feudal donation, “*Nomen baeredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli five stipitis descendant*”^c: the will of the donor, or original lord, (when feuds were turned from life estates

^b *Feud.* 1. §. 2.^c *Crag. I. i. t. 9. §. 36.*

into

into inheritances) not being to make them absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo*; not hereditary to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

HOWEVER, in process of time, when the feudal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is descended from, the first imaginary purchaser. For since it is not ascertained in such general grants, whether this feud shall be held *ut feudum paternum*, or *feudum avitum*, but *ut feudum antiquum* merely, as a feud of indefinite antiquity; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended; the law will not ascertain it, but will suppose *any* of his ancestors, *pro re nata*, to have been the first purchaser: and therefore it admits *any* of his collateral kindred (who have the other necessary

cessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum*; unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted: but every grant of lands in fee-simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance.

YET, when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed; and none are admitted, but the heirs of those through whom the inheritance hath passed: for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if

if lands come to John Stiles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and, *vice versa*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto: for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles; the relations of his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father. This is also the rule of the French law¹, which is derived from the same feudal fountain.

HERE we may observe, that, so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited it from his father Walter Stiles, or his mother Christian Smith; or, if it appear that his grandfather was the first grantee, and so took it

¹ Domat. part. 2. pr.

(by the general law) as as feud of indefinite antiquity ; in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate : because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

THIS then is the great and general principle, upon which the law of collateral inheritances depends ; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser ; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have, originally descended : according to the rule laid down in the Yearbook^k, Fitzherbert^l, Brock^m, and Haleⁿ ; “that he who would have been “heir to the father of the deceased” (and, of course, to the mother, or any other purchasing ancestor) “shall also be heir to the son.”

THE remaining rules are only rules of evidence, calculated to investigate who that pur-

^k M. 12 Edw. IV. 14.

^l Abr. t. Discent. 2.

^m Abr. t. Discent. 38.

ⁿ H.C.L. 243.

chasing ancestor was; which, *in feudis vere antiquis*, has in process of time been forgotten, and is supposed so to be in feuds that are held *ut antiquis*. A sixth rule or canon then is, that

VI.

The collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.

FIRST, he must be his next collateral kinsman, either personally or *jure repraesentationis*; which proximity is reckoned according to the degrees of consanguinity before-mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom

whom the claim must be derived from him ; and makes not only his great-nephew but also his first-cousin to be both related to him in the fourth degree ; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins ; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him : so that the great-nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second ; the former being distant three degrees from the common ancestor, and therefore deriving only one fourth of his blood from the same fountain with the *propositus*; the latter, and also the *propositus*, being each of them distant only two degrees from the common ancestor, and therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents ; and, having therein the same object in view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law,
and

and therefore counts it's degrees in the same manner. Indeed the designation of person (in seeking for the next of kin) will come to exactly the same end (though the degrees will be differently numbered) whichever method of computation we suppose the law of England to use; since the right of representation (of the father by the son, &c) is allowed to prevail *in infinitum*. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degrees of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, tho' no inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants therefore of John Stiles's brother are all of them in the first degree of kindred with respect to inheritances, as their father, when living, was; those of his uncle in the second; and so on; and are called to the succession in right of such their representative proximity.

THE right of representation being thus established, the former part of the present rule amounts to this; that, on failure of issue of the person last seised, the inheritance shall

O descend

descent to the issue of his next immediate ancestor. Thus if John Stiles dies without issue, his estate shall descend to Francis his brother, who is lineally descended from Geoffrey Stiles his next immediate ancestor, his father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. Very similar to which was the law of inheritance among the antient Germans, our progenitors:

"Haeredes successoresque sui cique liberi, & nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi."

Now here it must be observed that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely corresponds with ours^a, the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue, who are held to succeed not in their own

^a Tacitus *de mor. Germ.* 21. 2. Numb. c. 27.

rights.

rights, as brethren, uncles, &c, but in right of representation, as the sons of the father, grandfather, &c, of the deceased⁹. In order then to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the first degree; and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher to the ancestors in the second degree, and then to those in the third, and fourth, and so upwards *in infinitum*; till some ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent; and in such derivation the same rules must be observed, with regard to sex, primogeniture, and representation, that have just been laid down with regard to lineal descents from the person of the last proprietor.

BUT, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the whole blood; for, if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded.

⁹ Selden. *de succ. Ebr. c. 12.*

A KINSMAN of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other hath. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or, he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him; the blood of this issue, being compounded of the blood of Lucy Baker (it is true) on the one part, but of that of Lewis Gay (instead of Geoffrey Stiles) on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these

these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue; still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised: but, had A died without entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the person last actually seised^r.

THIS total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule; which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that an heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser,

^r Hale. H.C.L. 238.

that

that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to shew that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible; then the law substituted what Mr. justice Wright^{*} calls a *reasonable*, in the stead of an *impossible*, proof: for it remits the proof of an actual descent from the first purchaser; and only requires, in lieu of it, that the claimant be next of the whole blood to the person last in possession; (or derived from the same couple of ancestors) which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser. For he who is my kinsman of the whole blood can have no ancestors beyond or higher than mine, but what are equally my ancestors also; and mine are *vice versa* his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but

* Tenures. 186.

one half of his ancestors above the common stock the same as mine; and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchaser.

To illustrate this by example. Let there be John Stiles, and Francis, brothers by the same father and mother, and another son of the same mother by Lewis Gay a second husband. Now, if John dies seized of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir, for he is sure to be in the line of descent from the first purchaser, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchaser, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely *not to be* descended from the line of the first purchaser, as *to be* descended: and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

AND

AND, as this is the case *in feudis antiquis*, where there really did once exist a purchasing ancestor, who is forgotten; it is also the case *in feudis novis held ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchaser (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchaser, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law; since it is only upon a like supposition and fiction, that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all; for we have seen that in *feudis stricte novis* neither brethren nor any other collaterals were admitted. As therefore *in feudis antiquis* we have seen

seen the reasonableness of excluding the half blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

PERHAPS by this time the exclusion of the half blood does not appear altogether so unreasonable as at first sight it is apt to do. It is certainly a very fine-spun and subtile nicety: but, considering the principles upon which our law is founded, it is neither an injustice nor a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals: and, though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchaser, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though

all

all the ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood; yet, unless that common stock be in the first degree, (that is, unless they have the same father and mother) there will be intermediate ancestors below the common stock, that may belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors, than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher, (that is, the grandfather and grandmother) one half of John's ancestors will not be the ancestors of his uncle: his *patruus*, or father's brother, derives not his descent from John's maternal ancestors; nor his *avunculus*, or mother's brother, from those in the paternal line. Here then the supply of proof is deficient, and by no means amounts to a certainty: and, the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than

the

the whole blood in the same degrees. As, in the first degree, the whole brother of John Stiles is sure to be descended from that unknown ancestor; his half brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great uncle of the whole blood, but they are seven to one against his great uncle of the half blood, for seven eighths of John's ancestors have no connexion in blood with him. Therefore the much less probability of the half blood's descent from the first purchaser, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half blood in all.

BUT, while I thus illustrate the reason of excluding the half blood in general, I must be impartial enough to own, that, in some instances, the practice is carried farther than the principle upon which it goes will warrant. Particularly, when a man has two sons by different venters, and the estate on his death descends from him to the eldest, who enters,

and

and dies without issue: now the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor. This, it must be owned, carries a hardship with it, even upon feudal principles: for the rule was introduced only to supply the proof of a descent from the first purchaser; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half brother must be of the blood of the first purchaser, who was either the father or some of the father's ancestors. When therefore there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance can be evidently traced back, there seems no need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother indeed been a purchaser, there would have been no hardship at all, for the reasons already given: or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

INDEED

INDEED it is this very instance, of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *a patre*, that Craig^t has singled out, on which to ground his strictures on the English law of half blood: and, really, it should seem, as if the custom of excluding the half blood in Normandy^u extended only to exclude a *frater uterinus*, when the inheritance descended *a patre*, and *vice versa*. Thus also it remained a doubt with us in the time of Bracton^v, and of Fleta^x, whether the half blood on the father's side were excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly purchased lands. And the rule of law, as laid down by our Fortescue^y, extends no farther than this; *frater fratri uterino non succedit in haereditate paterna*. It is moreover worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign^z, so as it be the blood of the first monarch, pur-

^t I. 2. t. 15. §. 14.^u Gr. Constit. c. 25.^v I. 2. c. 30. §. 3.^x I. 6. c. 1. §. 14.^y de laud. LL. Angl. 5.^z Plowd. 245. Co. Litt. 15 b.

chasor,

chafor, or (in the feudal language) conqueror, of the reigning family. Thus it actually did descend from King Edward the sixth to Queen Mary, and from her to Queen Elizabeth, who were respectively of the half blood to each other. For the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock; which was formerly king William the Norman, and is now (by act of parliament^a) the princess Sophia of Hanover. Hence also it is, that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent^b: because, when the lineage is clearly made out, there is no need of this auxiliary proof. How far it might be desirable for the legislature to give relief, by amending the law of descents in this single instance, and ordaining that the half blood might inherit, where the estate notoriously descended from its own proper ancestor, but not otherwise; or how far a private inconvenience should be submitted to, rather than a long established rule should be shaken; it is not for me to determine.

^a 12 Will. III. c. 2.

^b Litt. §. 14, 15.

THE rule then, together with it's illustration, amounts to this; that, in order to keep the estate of John Stiles as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from both.

BUT here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances in a geometrical progression upwards^c, the descendants of all which respective couples are (representatively) related to him in the same degree. Thus in the second degree, the issue of George and Cecilia Stiles and of Andrew and Esther Baker, the two grandfathers and grandmothers of John Stiles are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior de-

^c See page 175.

grees)

grees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which therefore of these ancestors must we first resort, in order to find out descendants to be called to the inheritance? In answer to this, and to avoid the confusion and uncertainty that must arise between the several stocks, wherein the purchasing ancestor must be sought for, the seventh and last rule or canon is, that

VII.

In collateral inheritances the male stocks shall be preferred to the female; (that is, kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female) — unless where the lands have, in fact, descended from a female.

THUS the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all^a: and the relations of the father's father, before those of

^a Litt. §. 4.

the

the father's mother ; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden ^e, and Petit ^f; though among the Greeks, in the time of Hesiod ^g, when a man died without wife or children, all his remote kindred (without distinction) divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Justinian ^h abolished all distinction between them. It is also conformable to the customary law of Normandyⁱ, which indeed in most respects agrees with our law of inheritance.

HOWEVER, I am inclined to think, that this rule of our laws does not owe its immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule or canon before laid down; that every heir must be of the blood of the first purchasor. For when

^e *de Jure. Ebraeor. c. 12.*

^h *Nov. 118.*

^f *LL. Attic. l. 1. t. 6.*

ⁱ *Gr. Constit. c. 25.*

^g *Geog. 606.*

such first purchasor was not easily to be discovered after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession; but also, considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchasor to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father, rather than the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards; imagining with reason that this was the most probable way of continuing it in the line of the first purchasor. A conduct much more rational than the preference of the *agnati* by the Roman laws: which, as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one: upon which account this preference was very wisely abolished by Justinian.

THAT

THAT this was the true foundation of the preference of the *agnati* or male stocks, in our law, will farther appear if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed, and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchaser. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John Stiles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but also of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe the father of Cecilia, is excluded. Whereas when the side from which they descended is forgotten, or never known, (as in the case of an estate newly purchased to be holden *ut feudum antiquum*) here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and, if it finds

no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchasor. The greatest probability of finding such was among those descended from the male ancestors; but, upon failure of issue there, they may possibly be found among those derived from the females.

THIS I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that, if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchasor: but, as males have not been *perpetually admitted*, but only *generally preferred*; as females have not been *utterly excluded*, but only *generally postponed* to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchasor; which, joined with the other

other probability, of the wholeness or entirety of blood, will fall little short of a certainty.

BEFORE we conclude this first branch of our enquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search for the heir of a person, as JOHN STILES, who dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity^k.

IN the first place succeeds the eldest son, Matthew Stiles, or his issue: (n° 1.) — if his line be extinct, then Gilbert Stiles and the other sons, respectively, in order of birth, or their issue: (n° 2.) — in default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue. (n° 3.) — On failure of the descendants of JOHN STILES himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in: viz. first, Francis Stiles, the eldest brother of the whole blood, or his issue: (n° 4.) — then Oliver Stiles, and the other whole brothers, respectively, in order of birth, or their issue: (n° 5.) — then the sisters of the whole blood, all together, Bridget and Alice Stiles, or their issue. (n° 6.) — In defect of these, the issue of George and Cecilia

^k See the table of descents annexed.

Stiles, his father's parents; respect being still had to their age and sex: (n° 7.) — then the issue of Walter and Christian Stiles, the parents of his paternal grandfather: (n° 8.) — then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (n° 9.) — and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (n° 10.) — and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*; till both the immediate bloods of George Stiles, the paternal grandfather, are spent. — Then we must resort to the issue of Luke and Frances Kempe, the parents of JOHN STILES's paternal grandmother; (n° 11.) — then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (n° 12.) — and so on in the paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum*. — In default of which, we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother; (n° 13.) — and so on in the paternal grandmother's maternal line, or blood of Frances Holland, *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother,

mother, are also spent. — Whereby the paternal blood of JOHN STILES entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers, (n° 14, 15, 16.) Willis's, (n° 17.) Thorpes, (n° 18, 19.) and Whites; (n° 20.) in the same regular successive order as in the paternal line.

THE reader should however be informed, that the class, n° 10, would be postponed to n° 11, in consequence of the doctrine laid down, *arguendo*, by justice Manwoode, in the case of Clere and Brooke¹; from whence it is adopted by lord Bacon^m, and sir Matthew Haleⁿ. And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured to give the preference therein to n° 10 before n° 11; for the following reasons:

1. BECAUSE this point was not the principal question in the case of Clere and Brooke; but the law concerning it is delivered *obiter* only, and in the course of argument, by justice Manwoode; though afterwards said to be confirmed by the three other justices in sepa-

¹ Plowd. 450.

^m Elem. c. 1.

ⁿ H. C. L. 240, 244.

rate,

rate, extrajudicial, conferences with the reporter.

2. BECAUSE the chief-justice, Dyer, in reporting the resolution of the court in what seems to be the same case^o, takes no notice of this doctrine.

3. BECAUSE it appears, from Plowden's report, that very many gentlemen of the law were dissatisfied with this position of justice Manwoode,

4. BECAUSE the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table; and destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before given, besides the mere dignity of blood,

5. BECAUSE it introduces all that uncertainty and contradiction, pointed out by an ingenious author^p; and establishes a collateral doctrine, incompatible with the principal point resolved in the case of Clere and Brooke, viz.

^o Dyer, 314.

Pag. 30, 38, 61, 62, 66.

^p Law of inheritances, 2d edit,

the

the preference of n° 11 to n° 14. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all.

6. BECAUSE by the reason that is given for this doctrine, in Plowden, Bacon, and Hale, (viz. that in any degree, paramount the first, the law respecteth proximity, and not dignity of blood) n° 18 ought also to be preferred to n° 16; which is directly contrary to the eighth rule laid down by Hale himself¹.

7. BECAUSE this position seems to contradict the allowed doctrine of sir Edward Coke'; who lays it down (under different names) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles's (*alias* Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both n° 9 and n° 10 are extinct. Wherefore n° 11 (being the blood of the Kempes) ought not to inherit till then.

¹ Hist. C. L. 247.

² Co. Litt. 12 b. Hawk. abr. *in loc.*

8. BECAUSE in the case, Mich. 12 Ed. IV. 14^s, (much relied on in that of Clere and Brooke) it is laid down as a rule, that “*Cestuy, que doit inheriter al pere, doit inheriter al fits.*” And so sir Matthew Hale^t says, “that though the law excludes the father from inheriting, yet it substitutes and directs the descent, as it should have been, had the father inherited.” Now it is settled, by the resolution in Clere and Brooke, that n° 10 should have inherited to Geoffrey Stiles, the father, before n° 11; and therefore n° 10 ought also to be preferred in inheriting to JOHN STILES the son.

IN case JOHN STILES was not himself the purchaser, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, can never inherit. Thus, if it descended from Geoffrey Stiles, the father, the blood of Lucy Baker, the mother, is perpetually excluded: and so, *vice versa*, if it descended from Lucy Baker, it cannot descend to the blood of Geoffrey Stiles. This,

^s Fitzb. abr. t. *discent.* 2. Bro. abr. t. *discent.* 38. ^t Hist. C. L. 243.

in either case, cuts off one half of the table from any possible succession. And farther, if it can be shewn to have descended from George Stiles, this cuts off three fourths; for now the blood, not only of Lucy Baker, but also of Cecilia Kempe, is excluded. If, lastly, it descended from Walter Stiles, this narrows the succession still more, and cuts off seven eighths of the table; for now, neither the blood of Lucy Baker, nor of Cecilia Kempe, nor of Christian Smith, can ever succeed to the inheritance. And the like rule will hold upon descents from any other ancestors.

THE reader should bear in mind, that, during this whole process, JOHN STILES is the only person supposed to have been actually seised of the estate. For if ever it comes to vest in any other person, as heir to JOHN STILES, a new order of succession must be observed upon the death of such heir; since he, by his own seisin, now becomes himself an ancestor, or *stipes*, and must be put in the place of JOHN STILES. The figures therefore denote the order, in which the several classes would succeed to JOHN STILES, and not to each other: and, before we search for an heir in any of the higher figures, (as n° 8.) we must be first assured that all the lower classes

(from

(from n° 1 to 7.) were extinct, at JOHN STILES's decease.

HAVING thus endeavored to state the general law of DESCENTS, I proceed next to subjoin a few hints with regard to the special impediments which may obstruct this general law. Which will bring under our consideration the doctrine of ESCHEATS.

ESCHEAT, it is well known, was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman^v, in which language it signifies chance or accident, and thereupon denotes an obstruction of the descent, and consequent determination of the tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee^u.

THE law of escheats is founded upon this single principle, that the blood of the person last seised is, by some means or other, utterly extinct and gone: and, since none can inherit any estate but such as are of his blood and

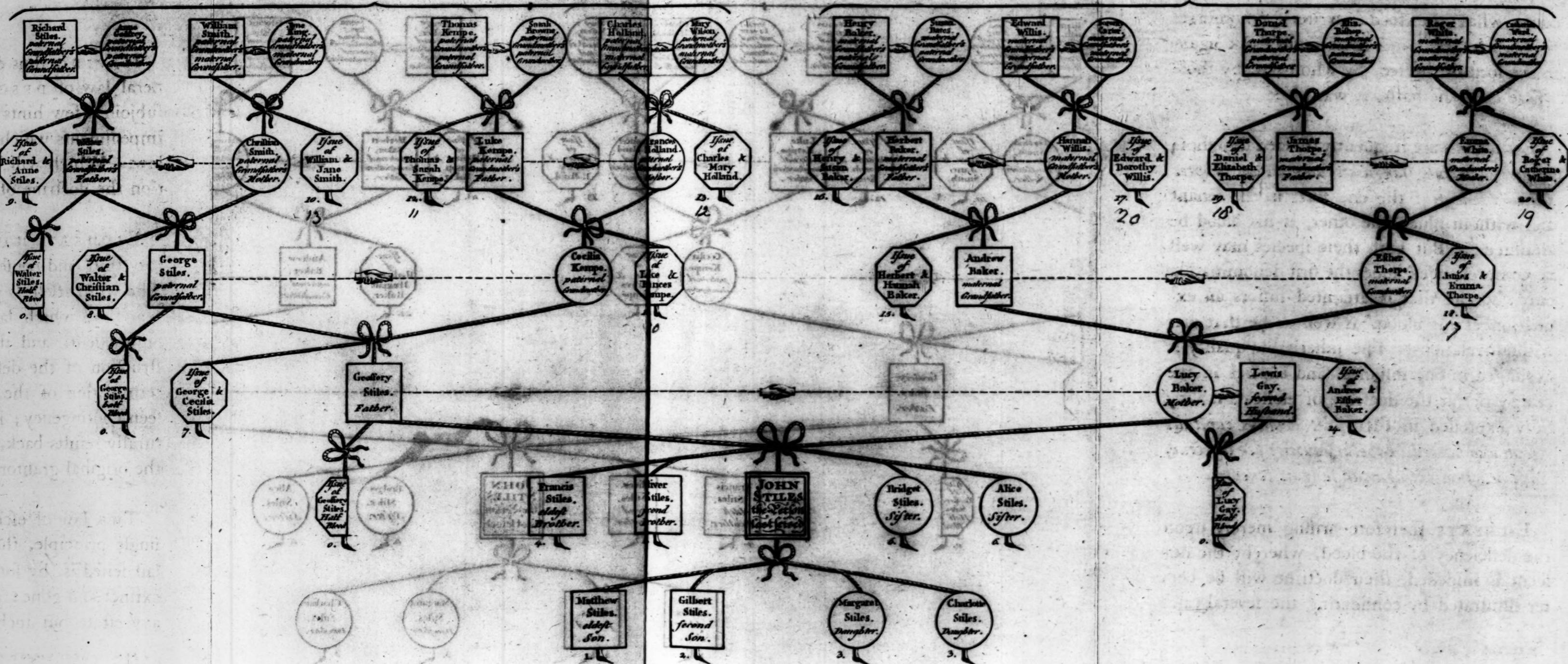
^v *Eſchet*, or *ēchet*; formed from the verb *eschoir* or *ēchoir*, to happen.

^u *2 Feud.* 86. Co. Litt. 13.

Table of Descents

PATERNAL LINE

MATERNAL LINE



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consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum*; and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

ESCHEATS are frequently divided into those *propter defectum sanguinis* and those *propter delictum tenantis*: the one sort, if the tenant dies without issue; the other, if his blood be attainted^w. But both these species may well be comprehended under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta^x, “*dominus capitalis feodi loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis tenantis.*”

ESCHEATS therefore arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases

^w Co. Litt. 13. 92 b.

^x 1. 6. c. 1.

wherein

wherein hereditary blood may be deficient, than by any other method whatsoever.

I, II, III. THE first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent before laid down and explained, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors; secondly, when he dies without any relations on the part of those ancestors from whom his estate descended: thirdly, when he dies without any relations of the whole blood. In two of these cases the blood of the first purchaser is certainly, in the other it is probably, at an end; and therefore in all of them the law directs, that the land shall escheat to the lord of the fee: for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to lands, who is not of the blood of the first feudatory, to whom for his personal merit the estate is supposed to have been granted.

IV. A MONSTER, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation,
hath

hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of it's body, yet if it hath human shape, it may be heir^y. This is a very antient rule in the law of England^z; and it's reason is too obvious, and too shocking, to bear a minute discussion. The civil law agrees with our own in excluding such births from successions^x: yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby^b; (as the *jus trium liberorum*, and the like) esteem-ing them the misfortune, rather than the fault, of that parent. If therefore there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

V. BASTARDS are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after it's determination. Such are held to be *nullius filii*, the sons of nobody; for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur*^c. Being thus the sons of nobody, they

^y Co. Litt. 7, 8.

^b Ff. 50. 16. 135. Paul. 4 sent. 9.

^z Bract. l.1. c.6. & l.5. tr.5. c.30. §. 63.

^a Ff. 1. 5. 14.

^c Co. Litt. 8.

have

have no blood in them, at least no inheritable blood ; consequently, none of the blood of the first purchaser : and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord ^d. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after it's birth the mother was married to the father ^e : and also, if the father had no lawful wife or child, then even if the concubine was never married to the father, yet she and her bastard son were admitted each to one twelfth of the inheritance ^f, and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married ; the mother being sufficiently certain, though the father is not ^g. But our law, in favour of marriage, is much less indulgent to bastards.

T H E R E is indeed one instance, in which our law has shewn them some little regard ; and that is usually termed the case of *bastard eignè* and *mulier puisnè*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law is

^d Finch. law. 227.

^e Nov. 89. c. 8.

^f Nov. 89. c. 12.

^g Cod. 6. 57. 5.

called

called a *mulier*, or as Glanvil^h expresses it in his Latin, *filius mulieratus*; the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is *bastard*, or *bastard eignè*; and the younger son is legitimate, or *mulier puisnè*. If then the father dies, and the *bastard eignè* enters upon his land, and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puisnè*, and all other heirs, (though minors, feme-coverts, or under any incapacity whatsoever) are totally barred of their rightⁱ. And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the *bastard's* life, and evicting him. 2. Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his lifetime. 3. Because the canon law (following the civil) did allow such *bastard eignè* to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter

^h I. 7. c. 1.ⁱ Litt. §. 399. Co. Litt. 244.

again,

again, and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all ^k.

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee ^l.

VI. ALIENS also are incapable of taking by descent, or inheriting ^m: for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introdu-

^k Litt. §. 400.

^m Co. Litt. 3.

^l Bract. l. 2. c. 7 Co. Litt. 244.

cinc our feuds, the defence of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his land shall escheat to the lord.

As aliens cannot inherit, so far they are on a level with bastards; but, as they are also disabled to hold by purchaseⁿ, they are under still greater disabilites. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit: but so it is expressly held^o, because they have not in them any inheritable blood.

AND farther, if an alien be made a denizen by the king's letters patent, and then purchases lands, (which the law allows such a one to do) his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires an hereditary quality, which will be transmitted to his subsequent posterity. Yet, if he had been naturalized by act of par-

ⁿ Co. Litt. 2 b.

^o Ibid. ¹ Lev. 59.

liament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not¹.

SIR Edward Coke² also holds, that if an alien cometh into England, and there hath issue two sons, who are thereby natural born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common stock of their consanguinity, is the father; and, as he had no inheritable blood in him, he could communicate none to his sons; and when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the antient law; not only from the rule before cited³, that *cestuy, que doit inheriter al pere, doit inheriter al fits*; but also because we have seen that the only feodal foundation upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors: but in this case as the immediate ancestor was an alien,

¹ Co. Litt. 129.

² Inst. 8.

³ See page 206, and 234.

from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum*; that is, by none but the lineal descendants of the purchasing brother; and, on failure of them, should escheat to the lord of the fee. But this opinion hath been since overruled³: and it is now held for law, that the sons of an alien, born here, may inherit to each other. And reasonably enough upon the whole: for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent.

IT is also enacted, by the statute 11 & 12 Will. III. c. 6, that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors lineal or collateral; although their father, or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seized.

³ Collingwood & Pace. ² Ventr. 473. ¹ Lev. 59. ¹ Sid. 193.

As if the elder brother of John Stiles be an alien, and his younger a naturalborn subject, upon his death without issue his lands will descend to the younger brother: now, if afterwards the elder brother hath a child, it was feared that, under the statute of king William, this newborn child might defeat the estate of his uncle. Wherefore it is provided, by the statute 25 Geo. II. c. 39, that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised:—with an exception however to the case, where lands shall descend to the daughter of an alien; which daughter shall resign such inheritance to her afterborn brother, or divide it with her afterborn sisters, according to the usual rule¹ of descents by the common law.

VII. By attainder also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable.

G R E A T care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by

¹ See page 180.

reason

reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law^w, as a part of punishment for the offence; and does not at all relate to the feudal system, nor is the consequence of any signiory or lordship paramount^x: but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more antient and superior law of forfeiture.

THE doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprised^y) is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vasal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration

^w *LL. Aelfred.* c.4. *LL. Canut.* c.54. ^x *3 Inst.* 15. *Stat.* 25 *Edw. III.* c.2.

^w *2 Inst.* 64. *Salk.* 85. ^x *§. 12.*

of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feudal escheat was brought into England at the conquest; and in general superadded to the antient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in it's passage; in case of treason, for ever; in case of other felony, for only a year and a day, after which time it goes to the lord in a regular course of escheat^y, as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands, (which seem to be the old Saxon tenure) that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason^z.

^y 2 Inst. 36.

^z Somner. 53. Wright. Ten. 118.

As a consequence of this doctrine of escheat, all lands of inheritance immediately reverting in the lord, the wife of the felon was liable to lose her dower, till the statute 1 Edw. VI. c. 12. enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the antient law of forfeiture operates, for it is expressly provided by the statute 5 & 6 Edw. VI. c. 11, that the wife of one attaint of high treason shall not be endowed at all.

HITHERTO we have only spoken of estates vested in the offender, at the time of his offence, or attainer. And here the law of forfeiture stops ; but the law of escheat pursues the matter still farther. For, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all he now has should escheat from him, but also that he should be incapable of inheriting any thing for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore a father be seised in fee, and the son commits treason and is attainted, and then the father dies : here the land shall escheat to the lord ; because the son, by the corruption of his

his blood, is incapable to be heir, and there can be no other heir during his life: but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit^a. In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood: here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king so long as the offender lives^b.

THERE is yet a farther consequence of the corruption and extinction of hereditary blood, which is this: that the person attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The chanel, which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a

^a Co. Litt. 13.

^b 3 Inst. 47.

refine-

refinement upon the antient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony^c. But, by the law of England, a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor any other ancestor^d, at least on the part of their father.

THIS corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender, but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned: but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If therefore a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so: but if the son had been born after the pardon, he might inherit; because

^c Van Leeuwen in 2 *Feud.* 31. See ^d Co. Litt. 391 b.
Cro. Eliz. 28.

by the pardon the father is made a new man, and may convey new inheritable blood to his afterborn children *.

HEREIN there is however a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we have seen, than an alien elder brother shall not impede the descent to a natural - born younger brother. But in attainters it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir; neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir; and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though, had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood ^f. So if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the

* Co. Litt. 392.

^f Co. Litt. 8.

father

father dies, the lands of the father shall not descend to the younger son : for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord^g. Sir Edward Coke in this case allows^h, that if the ancestor be attainted, his sons born before the attainer may be heirs to each other ; and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father : but it is said that sons, born after the attainer, shall not inherit to each other ; for they never had any inheritable blood in themⁱ.

UPON the whole it appears, that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor ; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feodal property, is blotted out, corrupted, and extinguished for ever : the consequence of

^g Dyer. 48.

^h Co. Litt. 8,

ⁱ Ibid.

which

which is, that estates, thus impeded in their descent, result back and escheat to the lord.

THIS corruption of blood, thus arising from feudal principles, but extended infinitely farther than those principles will warrant, has been long looked upon as a peculiar hardship; both because the establishment of the feudal system in this kingdom was founded at first upon a fiction^k; and also because, the substantial part of those tenures being now done away, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty, but be laid under future difficulties of inheritance, on account of the guilt of their parents. And therefore in most (if not all) of the new felonies, created by parliament since the reign of Henry the eighth, it is declared that they shall not extend to any corruption of blood. And by the statute 7 Ann. c. 21, the operation of which is postponed by the statute 17 Geo. II. c. 39, it is enacted, that, after the death of the present pretender and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself.

^k Wright. 58.

BEFORE I conclude this head, of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation: for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat: which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told¹, doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant faileth. This is indeed founded upon the self-same principle as the law of escheat: the heirs of the donor being only substituted instead of the chief lord of the fee; which was formerly very frequently the case in subinfeudations, or alienation of lands from one vasal to another, till that practice was restrained and remedied by the statute of *Quia emptores*, 18 Edw. I. st. 1, to which this very singular instance still in some degree remains an exception.

¹ Co. Litt. 13 b.

THERE

THERE is one more incapacity of taking by descent, which, not being productive of any escheat, is not reducible to the method laid down in the preceding treatise. It is enacted by the statute 11 & 12 Will. III. c. 4. that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking, by descent as well as purchase, any real estates whatsoever ; and his next of kin, being a protestant, shall hold them to his own use, till such time as he complies with the terms imposed by the act. This incapacity is merely personal ; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion and became a monk professed was incapable of inheriting lands, both in our own ^m and the feudal law ; *eo quod desit esse miles seculi qui factus est miles Christi ; nec beneficium pertinet ad eum qui non debet gerere officium*ⁿ. But yet he was accounted only *civiliter mortuus* ; he

^m Co. Litt. 132.

ⁿ 2 Feud. 21.

did

did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.

THESE are the several deficiencies of hereditary blood, recognized by the law of England, which, so often as they happened under the feudal polity, occasioned lands to escheat to the original proprietary or lord; to be by him applied to his own use, or granted out to a fresh feudatory, as he should think proper. We have chiefly considered them at present as the means whereby an obstruction is formed to the general course of descents; and taken in that light, they form no improper supplement to a discourse, of which the law of inheritance is the first and principal object.

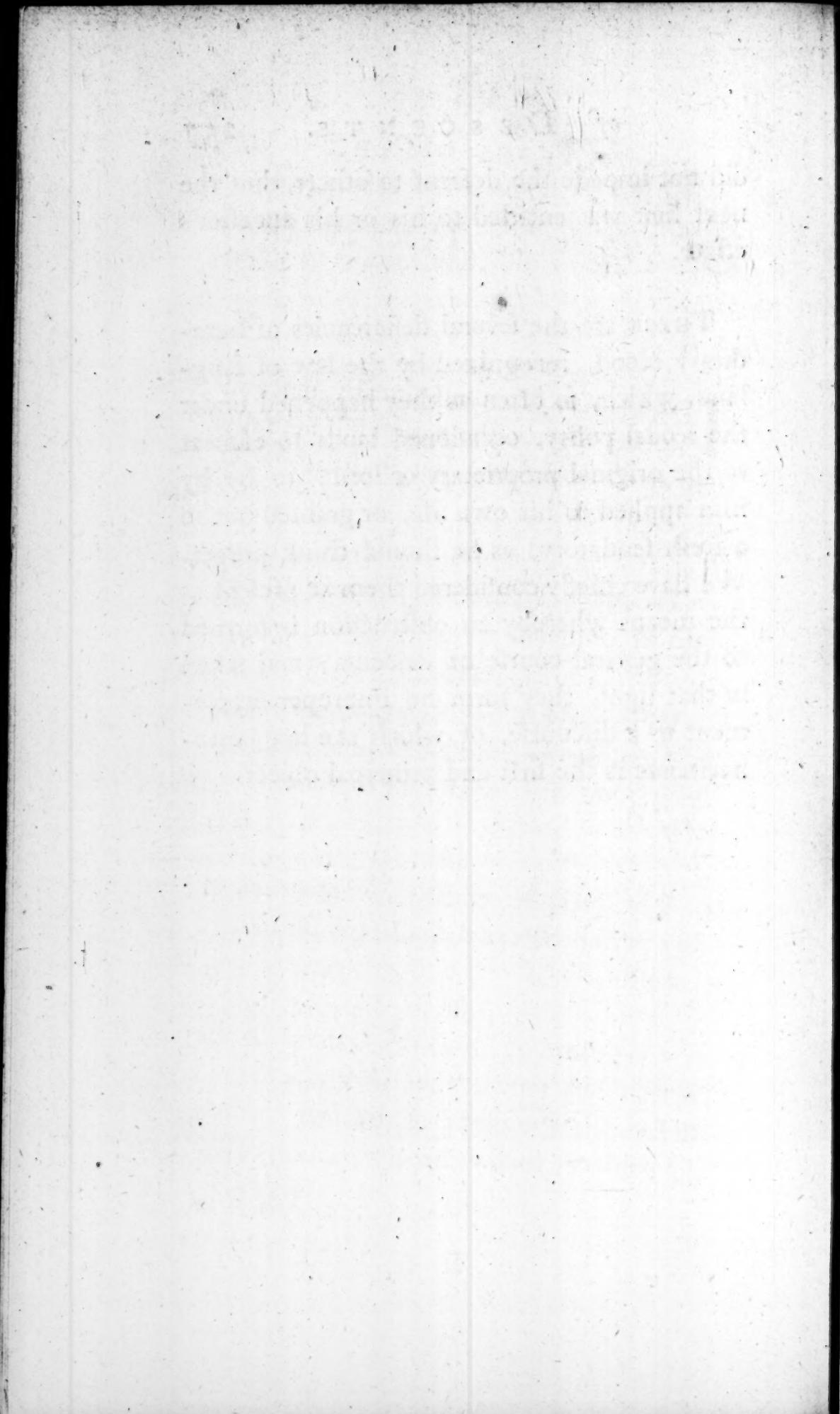


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